

been putting in in the last several weeks.

The individuals that work in our Washington, D.C. and our Ogden, Utah, district offices are truly the unsung heroes in our world.

I often get the credit by having my name on a bill or my name on an interview, but the work that they have been doing to help our American citizens in Afghanistan and our partners is unprecedented.

All summer we have been dealing with State Department backlogs to get their passports so they can go to Costa Rica or something like that, and they have been doing a very good job. It all turned very real as we have been working around the clock and taking an enormous amount of stress and anguish to do our part.

I hope that the First District of Utah knows that our team is working to do everything we can to help out those families who are directly affected by this.

Our thoughts and prayers are going to a better outcome as we come out of this.

EXPLANATORY MATERIAL STATEMENT ON H.R. 4, JOHN R. LEWIS VOTING RIGHTS ADVANCEMENT ACT OF 2021, SUBMITTED BY MR. NADLER, CHAIR OF THE COMMITTEE ON THE JUDICIARY

Mr. NADLER. Madam Speaker, pursuant to section 2 of H. Res. 601, I submit the following materials into the CONGRESSIONAL RECORD as Explanatory Materials for H.R. 4. Taken together, these materials help explain the reasons why H.R. 4 is necessary as well as the reasons for the particular provisions in the bill. The materials are as follows:

1. A section-by-section analysis of H.R. 4, as perfected by the Manager's Amendment;
2. A memorandum explaining the inclusion of key provisions in the bill in light of the records developed in hearings before the House Judiciary Committee and the Committee on House Administration;
3. Testimony of Wade Henderson of the Leadership Conference for Civil and Human Rights, explaining ongoing voting discrimination in certain states;
4. Testimony of Peyton McCrary of George Washington University Law School, explaining the data that supports the coverage formula in H.R. 4;
5. Testimony of Sophia Lin Lakin, Deputy Director of the Voting Rights Project, American Civil Liberties Union, explaining the need for a revised preliminary injunction standard, a Purcell fix, and a burden-shifting test for section 2 vote denial claims;
6. Testimony of Wendy Weiser, Vice President, Democracy, the Brennan Center for Justice, explaining the constitutionality of H.R. 4's geographic coverage formula;
7. Testimony of Jon Greenbaum, Chief Counsel of the Lawyers' Committee for Civil Rights Under Law, explaining the need for the incorporation of a retrogression standard in section 2 and the need for a prescriptive approach to assessing vote denial claims under section 2;
8. Testimony of Bernard Fraga of Emory University regarding evidence in support of the practice-based coverage formula and its demographic thresholds;
9. Letter from the Leadership Conference on Civil and Human Rights and other civil

rights groups in support of H.R. 4 and outlining the need for the bill;

10. Statement of Administration Policy in support of H.R. 4 from the Executive Office of the President;

11. Brennan Center—Racial Voter Suppression in 2020 Executive Summary, outlining the contemporary nature of voting discrimination;

12. Brennan Center—Representation for Some Executive Summary;

13. Brennan Center—Racial Turnout Gap Grew in Jurisdictions Previously Covered by the Voting Rights Act, outlining the reasons why focusing on increases in minority turnout, alone, masks a continuing racial disparity in voter turnout;

14. Brennan Center—Large Racial Turnout Gap Persisted in 2020 Election; and

15. A report prepared by the Subcommittee on Elections of the Committee on House Administration, outlining ongoing voter suppression efforts in various states.

SECTION-BY-SECTION ANALYSIS OF JOHN R. LEWIS VOTING RIGHTS ADVANCEMENT ACT OF 2021 FOR THE 117TH CONGRESS AS AMENDED

Section 1. Short Title. Section 1 sets forth the short title of the bill as the "John R. Lewis Voting Rights Advancement Act of 2021" ("VRAA").

Section 2. Vote Dilution, Denial, and Abridgement Claims. Section 2 of the bill would amend Section 2 of the Voting Rights Act of 1965 ("VRA") in response to the Supreme Court's decision in *Brnovich v. Democratic National Committee*. VRA Section 2(a) prohibits states and localities from imposing a voting rule that has the purpose or effect of denying or abridging citizens' right to vote because of race, color, or language minority status. VRA Section 2(b) currently lays out a test for determining when such a violation has occurred, providing that a violation is established if, "based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."

In response to the *Brnovich* Court's narrowing of Section 2(b) in vote denial cases (and with potential risk for vote dilution cases), the bill creates a bifurcated test, one that would apply to vote dilution claims (e.g., challenges to redistricting or changes in district or jurisdictional boundaries) and vote denial claims (e.g., challenges to changes in voting rules).

Section 2(a) of the bill would amend Section 2(a) of the VRA by making technical amendments to clarify that subsection (b) and new subsections (c), (d), or (e) apply when determining a violation under Section 2(a) of the VRA.

Section 2(b) of the bill amends Section 2(b) of the VRA to preserve the existing "totality of the circumstances" test, and expressly adopt the list of non-exhaustive factors applied by federal courts considering Section 2 vote dilution claims that were outlined in the Supreme Court's 1986 decision in *Thornburg v. Gingles*. Section 2(b) of the bill requires a plaintiff to establish as a threshold matter that 1) the members of the protected are sufficiently numerous and geographically compact to constitute a majority in a single member district; 2) the members of the protected class are politically cohesive; and 3) the residents of that district who are not the members of the protected class usually vote sufficiently as a bloc to enable

them to defeat the preferred candidates of the members of the protected class.

Section 2(b) of the bill also provides that once the plaintiff establishes the required threshold showing, a court must consider a totality of the circumstances analysis with respect to a claim of vote dilution to determine whether there has been a violation of Section 2(A) of the VRA, which must include consideration of the following factors:

(1) The extent of any history of official voting discrimination in the state or political subdivision that affected the right of members of the protected class to register, to vote, or otherwise to participate in the political process.

(2) The extent to which voting in the elections of the state or political subdivision is racially polarized.

(3) The extent to which the state or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the members of the protected class, such as unusually large elections districts, majority vote requirements, anti-single shot provisions, or other qualifications, prerequisites, standards, practices, or procedures that may enhance the opportunity for discrimination against the members of the protected class.

(4) If there is a candidate slating process, whether the members of the protected class have been denied access to that process.

(5) The extent to which members of the protected class in the state or political subdivision bear the effects of discrimination, both public or private, in such areas as education, employment, health, housing, and transportation which hinder their ability to participate effectively in the political process.

(6) Whether political campaigns have been characterized by over or subtle racial appeals.

(7) The extent to which members of the protected class have been elected to public office in the jurisdiction.

Section 2(b) also provides that in conducting a totality of the circumstances analysis under this subsection a court may consider such other factors as the court may determine to be relevant, including 1) whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the protected class, including a lack of concern for or responsiveness to the requests and proposals of the members of the protected class, except that compliance with a court order may not be considered evidence of responsiveness on the part of the jurisdiction; and 2) whether the policy underlying the state or political subdivision's use of such voting practices is tenuous. In making this second determination, Section 2(b) further requires a court to consider whether the qualification, prerequisite, standard, practice, or procedure in question was designed to advance and materially advances a valid and substantiated state interest.

Section 2(b) of the bill also amends Section 2 of the VRA to create a new subsection 2(c) to govern claims of vote denial. Under new subsection 2(c), a violation of Section 2(a) is established if a voting standard, practice, or procedure 1) results or will result in members of a protected class facing greater costs or burdens in participating in the political process than other voters and 2) that the greater costs or burdens are, at least in part, caused by or linked to social and historical conditions that have or currently produce on the date of such challenge discrimination on the basis of race, color, or language minority status. Section 2(b) further states that in determining the existence of a burden, the absolute number or the percent of voters affected or the presence of voters who are not

members of a protected class in the affected area is not be dispositive, and the affected area may be smaller than the jurisdiction to which the qualification, prerequisite, standard, practice, or procedure applies. Additionally, Section 2(b) provides that the challenged voting rule need only be one “but-for” cause of the discriminatory result.

Section 2(b) also expressly outlines for courts the factors that are relevant to the totality of the circumstances analysis in a vote denial claim under new subsection 2(c). The factors that are relevant include the following:

(1) The extent of any history of official voting-related discrimination in the state or political subdivision that affected the right of members of the protected class to register, to vote, or otherwise to participate in the political process.

(2) The extent to which voting in the elections of the state or political subdivision is racially polarized.

(3) The extent to which the state or political subdivision has used photo ID requirements, documentary proof of citizenship requirements, documentary proof of residence requirements, or other voting practices or procedure beyond those required by federal law that impair the ability of members of the minority group to participate fully in the political process.

(4) The extent to which minority group members bear the effects of discrimination both public or private, in areas such as education, employment, health, housing, and transportation, which hinder their ability to participate effectively in the political process.

(5) The use of overt or subtle racial appeals either in political campaigns or surrounding adoption or maintenance of the challenge practice.

(6) The extent to which members of the minority group have been elected to public office in the jurisdiction, provided that the fact that the minority group is too small to elect candidates of its choice shall not defeat a vote denial claim.

(7) Whether there is a lack of responsiveness on the part of elected officials to the particularized needs of minority group members including a lack of concern for or responsiveness to the requests and proposals of the group, except that compliance with a court order may not be considered evidence of responsiveness on the part of the jurisdiction.

(8) Whether the policy underlying the state or political subdivision's use of the challenged voting practice is tenuous. In making a determination under this clause, a court shall consider whether the qualification, prerequisite, standard, practice, or procedure in question was designed to advance and materially advances a valid and substantiated State interest.

(9) Such other factors as the court may determine to be relevant subject to the limitations set forth in this subsection.

Section 2(b) also outlines the factors that are not relevant to the “totality of the circumstances” in a vote denial claim under new subsection 2(c). The factors that are not relevant include the following:

(1) The degree to which the challenged voting practice has a long pedigree or was in widespread use at some earlier date.

(2) The use of an identical or similar voting practice in other states or jurisdictions.

(3) The availability of other forms of voting unimpacted by the challenged voting practice to all members of the electorate, including members of the protected class, unless the jurisdiction is simultaneously expanding such other practices to eliminate any disproportionate burden imposed by the challenged voting practice.

(4) Unsubstantiated defenses that the qualification, prerequisite, standard, practice, or procedure is necessary to address criminal activity.

Section 2(b) creates new subsection 2(d) which clarifies that 1) a violation of Section 2(a) of the VRA for the purpose of a vote denial or abridgement is established if the challenged voting practice is intended, at least in part, to dilute minority voting strength or to deny the right of any citizen to vote on account of race, color, or membership in a language minority group; 2) that racial discrimination need only be one purpose behind the challenged voting rule in order to establish a violation of Section 2(a) of the VRA; 3) that a voting practice intended to dilute minority voting strength or make it more difficult for minority voters to cast a ballot that will be counted violates this subsection even if an additional purpose of the voting practice is to benefit a particular political party or group; 4) that the context for the adoption of the challenged voting practices, including actions by official decisionmakers, may be relevant to a violation of this subsection; and 5) that claims under this subsection require proof of a discriminatory impact but do not require proof of a violation of new subsection 2(b) or new subsection 2(c).

Lastly, Section 2(b) creates new subsection 2(e) which for the purposes of Section 2 defines the term “affected area” to mean any geographic area in which members of a protected class are affected by a qualification, prerequisite, standard, practice, or procedure allegedly in violation of this section, within a State (including any Indian lands).

Section 3. Retrogression. Section 3 of the bill would add after Section 2 of the VRA as amended by the Act a new Section 2(f). Section 2(f) effectively imports Section 5's retrogression standard into Section 2 by establishing that a violation of Section 2(a) occurs where a voting law or rule makes minority citizens worse off than the status quo in terms of their ability to vote. Specifically, such a voting rule would violate Section 2(a) if it had the purpose or will have the effect of diminishing the ability of any citizen to participate in the electoral process or elect a candidate of their choice on account of their race, color, or membership in a language minority group. The subsection applies retroactively to any action taken on or after January 1, 2021.

Section 3 also creates a new subsection 2(g) which clarifies that the decisions of the United States District Court for the District of Columbia preclearing any state or political subdivision's change to a voting law or practice supersedes new subsection 2(f).

Section 4. Violations Triggering Authority of Court to Retain Jurisdiction. Section 4(a) amends Section 3(c) of the VRA to strengthen the “bail-in” provision by permitting courts to bail in jurisdictions where there have been violations of the VRA and other federal prohibitions against discrimination in voting, in addition to instances where there have been violations of the Fourteenth or Fifteenth Amendments. Section 3(c) of the VRA, known as the “bail-in” provision, currently allows courts to retain jurisdiction to supervise further voting changes in jurisdictions where the court has found violations of the Fourteenth or Fifteenth Amendments. If a jurisdiction is “bailed in,” it must submit any changes to its voting procedures for approval either to a U.S. district court or to the Attorney General. Section 4(a) strikes “violations of the Fourteenth and Fifteenth amendment” and inserts “violations of the Fourteenth or Fifteenth Amendments, violations of this Act, or violations of any Federal law that prohibits discrimination in voting on the basis of race, color, or membership in a language minority group.”

Lastly, Section 4(b) of the bill also makes technical and conforming amendments to Section 3(a) of the VRA.

Section 5. Criteria for Coverage of States and Political Subdivisions. Section 5(a)(1) of the bill amends Section 4(b) of the VRA by inserting a new coverage formula intended to meet the requirements set out in Shelby County. Formerly, Section 4(b) provided the coverage formula for determining which jurisdictions were subject to the Section 5 preclearance requirement. The coverage formula was triggered if a state or political subdivision, as of various points in the 1960s or early 1970s, (1) employed prohibited “tests or devices” used to limit voting and (2) had fewer than 50 percent voter registration or turnout among its voting-age population. In Shelby County, the Court held that Section 4(b) was unconstitutional because it imposed current burdens that were no longer responsive to the current conditions in the voting districts in question.

Under the new coverage formula in Section 5(a)(1), “a State and all political subdivisions within the State” during a calendar year would be covered if, during the previous 25 calendar years, there were 1) 15 or more voting rights violations occurred in the state; 2) ten or more voting rights violations occurred in the state and at least one violation was committed by the state itself, rather than a political subdivision (e.g., county, town, school district); or (3) three or more voting rights violations occurred in the state and the state itself administers elections in the state or in political subdivisions in which the voting rights violations occurred. In addition, Section 5(a)(1) provides that a political subdivision would be covered if three or more voting rights violations occurred in that subdivision during the past 25 years. Section 5(a)(1) specifies that the 25-year coverage period ends 10 years after a jurisdiction is covered.

Section 5(a)(1) provides that if a state or political subdivision obtains declaratory judgment and the judgment remains in effect, coverage under preclearance shall no longer apply unless voting rights violations occur after the issuance of a declaratory judgment.

Section 5(a)(1) defines several types of events or incidents as “voting rights violations.” The definition includes:

(1) a final judgment or any preliminary, temporary, or declaratory relief that was not reversed on appeal in which the plaintiff prevailed or a federal court found that the plaintiff demonstrated a likelihood of success on the merits or raised a serious question with regard to race discrimination, in which any federal court determined that a state or political subdivision denied or abridged the right to vote on account of race, color, or membership in a language minority group, or that a voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting, created an “undue burden” in connection with a claim that the challenged rule unduly burdened minority citizens in violation of the Fourteenth or Fifteenth Amendment anywhere in the state or subdivision;

(2) a final judgment or any preliminary, temporary, or declaratory relief that was not reversed on appeal in which the plaintiff prevailed or a federal court found that the plaintiff demonstrated a likelihood of success on the merits or raised a serious question with regard to race discrimination, in which any federal court determined that a voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting was imposed or applied or

would have been imposed or applied anywhere in the state or subdivision in a manner that denied or abridged or would have denied or abridged minority citizens' right to vote, in violation of various VRA provisions;

(3) a final judgment, that is not reversed on appeal, by a federal court denying a state or political subdivision's lawsuit seeking a declaratory judgment under Section 3(c) or Section 5 of the VRA that its proposed change does not have the purpose or effect of denying citizens the right to vote on account of race, color, or language-minority status and thereby prevented a voting practice from being enforced anywhere within the state or subdivision;

(4) an objection by the Attorney General under Section 3(c) or Section 5 of the VRA, which thereby prevent a voting practice to be enforced anywhere within the state or subdivision. A violation does not occur if the Attorney General has withdrawn an objection unless the withdrawal was in response to a change in the law or practice that served as the basis of the objection. A violation also does not occur where the objection is based solely on a state or political subdivisions' failure to comply with a procedural process that would not otherwise constitute an independent violation of this act; or

(5) a consent decree, settlement, or other agreement that was adopted or entered by a federal court or contained an admission of liability by the defendants, which resulted in the alteration or abandonment of a voting practice anywhere within the territory of the state or subdivision that had been challenged as discriminatory under the VRA. An extension or modification of such consent decree, settlement, or other agreement that has been in place for 10 years or longer constitutes an independent violation. If a court finds that an agreement itself defined by this subsection denied or abridged the right to vote of any citizen on account of race, color, or membership in a language minority group, violated the provisions of the VRA, or created an undue burden on minority citizens' right to vote in connection with a claim that the consent decree, settlement, or other agreement unduly burdened voters of a particular race, color, or language minority group, that finding shall count as an independent violation.

(6) in the case of multiple violations committed by a jurisdiction, each violation is to count as an independent violation, and within a redistricting plan, each violation found to discriminate against any group of voters based on race, color, or language minority group shall count as an independent violation.

Section 5(a)(1) sets forth the timing of determinations of voting rights violations by the Attorney General and requires that the determinations are made "[a]s early as practicable during each calendar year . . . including updating the list of voting rights violations occurring in each State and political subdivision for the previous calendar year." This section also provides that the determination or certification of the Attorney General shall be effective upon publication in the Federal Register.

Section 5(a)(2) of the bill makes conforming amendments to Section 4(a) of the VRA. Section 4(a) of the VRA provides the mechanism by which a covered jurisdiction can "bail out" of the preclearance requirement. Essentially, a jurisdiction must demonstrate to a court that it has not engaged in discriminatory practices and has complied with the preclearance process in the preceding 10 years.

Section 5(b) of the bill amends Section 4(a)(1) by striking "race or color," and inserting "race, color, or in contravention of the guarantees of subsection (f)(2)," which

protects the voting rights of a member of a language minority.

Section 5(c)(1) of the bill amends Section 4 of the VRA by adding a new subsection (g). New subsection (g) provides an administrative bailout process for local jurisdictions without a history of discrimination that might be captured by geographic preclearance coverage.

New subsection (g)(1)(A) requires the Attorney General after making the determination as to which states are subject to geographic preclearance to also determine which political subdivisions of those states are eligible for an exemption under subsection (g) and to publish the list of any such political subdivisions in the Federal Register. Furthermore, any political subdivision so listed is not subject to any requirement under Section 5 until the date on which any application under this section has been finally disposed of or no such application may be made.

New subsection (g)(1)(B) creates a rule of construction that states that determinations made pursuant to inclusion on the published list under subsection (g)(1)(A) does not have any binding or preclusive effect nor does inclusion constitute a final determination by the Attorney General that a listee is eligible for an exemption; that a listee has satisfied eligibility requirements (A) through (F) provided under new subsection (g)(2); or that the listee is entitled to an exemption under new subsection (g).

New subsection (g)(2) sets forth the eligibility requirements for an exemption under this new subsection. New subsection (g)(2) states that a political subdivision that makes an application under new subsection (g)(3) is eligible for an exemption under this subsection provided that during the ten years preceding the filing of the application, and during the pendency of such application:

(A) no test or device referred to in subsection 4(a)(1) of the VRA has been used within the political subdivision with the purpose or effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group;

(B) no final judgment of any court of the United States, other than the denial of declaratory judgment under this section, has determined that denials or abridgements of the right to vote on account of race, color, or membership in a language minority group have occurred anywhere in the territory of such political subdivision and no consent decree, settlement, or agreement has been entered into resulting in any abandonment of a voting law or practice challenged on such grounds; and no declaratory judgment under this section has been entered during the pendency of an action commenced before the filing of an action under this section and alleging such denials or abridgements of the right to vote;

(C) no federal examiners or observers under the VRA have been assigned to such political subdivision;

(D) such political subdivision and all governmental units within its territory have complied with Section 5 of the VRA, including compliance with the requirement that no change covered by Section 5 has been enforced without preclearance under Section 5, and have repealed all changes covered by Section 5 to which the Attorney General has successfully objected or as to which the United States District Court for the District of Columbia has denied declaratory judgment;

(E) the Attorney General has not interposed any objection (that has not been overturned by a final judgment of a court) and no declaratory judgment has been denied under Section 5, with respect to any submission or by or on behalf of the plaintiff or any gov-

ernmental unit within its territory under Section 5, and no such submissions or declaratory judgment actions are pending; and

(F) such political subdivisions and all governmental units within its territory have eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process; engaged in constructive efforts to eliminate intimidation and harassment of persons exercising rights protected under the VRA; and engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process.

New subsection (g)(3) establishes the application period for the exemption provided under new subsection (g). Not later than 90 days after the publication of the list under new subsection (g)(1)(A), a political subdivision included under such a list may submit an application containing such information that the Attorney General may require, and the Attorney General must provide notice in the Federal Register of such an application.

New subsection (g)(4) requires the Attorney General to establish a comment period during the 90 days beginning on the date that notice is published under new subsection (g)(3) to give interested persons an opportunity to submit objections to the Attorney General regarding the issuance of an exemption under this subsection to a political subdivision on the basis that it may not meet the eligibility requirements under new subsection (g)(2). New subsection (g)(4) also requires the 90-day period to be extended for an additional 30 days during the 1-year period beginning on the effective date of this subsection. Additionally, the Attorney General must notify the political subdivision of each submitted objection and afford the political subdivision the opportunity to respond.

New subsection (g)(5) sets forth requirements for the Attorney General when making a determination as to the objections submitted during the 90-day comment period established under new subsection (g)(4). Under this subsection, the Attorney General must consider and respond to each objection (and any response of the political subdivision) during the 60-day period beginning on the day after the comment period under new subsection (g)(4) concludes. If the Attorney General determines that any objection is justified, the Attorney General must publish notice in the Federal Register denying the application for an exemption. If the Attorney General determines that no objection submitted is justified, no later than 90 days after the 60-day comment period established under this subsection concludes, each person that submitted an objection may file in the District Court of the District of Columbia, an action for judicial review of such determination in accordance with 5 U.S.C. Ch. 7.

New subsection (g)(6) provides the Attorney General the authority to issue an exemption under this subsection by publication in the Federal Register from the application of the preclearance formula in Section 4(a) with respect to a political subdivision that is eligible under new subsection (g)(2) and to which no objection submitted under new subsection (g)(4) or determined justified under new subsection (g)(5).

New subsection (g)(7) states that, unless explicitly provided in this subsection, no determination under this subsection shall be subject to judicial review, and that all determinations under this subsection are committed to the discretion of the Attorney General.

New subsection (g)(8) exempts a political subdivision from geographic preclearance

coverage under Section 4(a) if that political subdivision obtained a declaratory judgment entered prior to the effective date of this subsection “bailing out” the political subdivision and the political subdivision has not violated any of the eligibility requirements set forth in new subsection (g)(2) any time thereafter.

Section 5(c)(2)(A) of the bill makes several technical and conforming amendments to Section 4(a)(1) of the VRA.

Section 5(c)(2)(B) of the bill creates a self-executing amendment to the VRA, establishing that 1 year following the effective date of new subsection (g), Section 4(g)(3) of the VRA (new subsection (g)(3) in this document) is amended by striking “During the 1 year period beginning on the effective date of this subsection, such 90-day period shall be extended by an additional 30 days.” Section 5(c)(2)(B) also provides that for the purposes of any periods under such section commenced as of such date, the 90-day period shall remain extended by an additional 30 days.

Section 6. Determination of States and Political Subdivisions Subject to Preclearance for Covered Practices. Section 6 of the bill would add after Section 4 of the VRA a new “Section 4A” that would provide a new “practice-based preclearance” formula for known practices that would apply nationwide and cover voting law changes that have historically been used to discriminate against voters.

New Section 4A(a)(1) provides that each state and political subdivision must identify all new laws, regulations, or policies that include voting qualifications or prerequisites to voting covered by subsection (b) and ensure that no covered practice is implemented unless it has been precleared.

New Section 4A(a)(2)(A) provides that the Attorney General, in consultation with the Director of the Bureau of Census and the heads of other relevant governmental offices, must determine as early as possible each calendar year the voting-age populations and characteristics of those populations, and publish a list of the states and subdivisions to which a voting-age population characteristic described in the “Covered Practices” section. Section 4A(a)(2)(B) of the bill sets forth that a “determination or certification of the Attorney General under this paragraph shall be effective upon publication in the Federal Register.”

New Section 4A(b) defines the following as “covered practices” and includes additional protections for Native American voters:

(1) any change to the method of election to (a) add seats elected at-large or (b) convert one or more seats elected from a single-member district to one or more at-large seats or seats from a multi-member district in a state or subdivision where “2 or more racial groups or language minority groups each represent 20 percent or more of the political subdivision’s voting-age population” or “a single language minority group represents 20 percent or more of the voting-age population on Indian lands located in whole or in part in the political subdivision”;

(2) any change or series of changes within a year to the boundaries of jurisdictions that reduces by 3 or more percentage points the proportion of the jurisdiction’s voting-age population that is comprised of members of a single racial group or language minority group in a state or subdivision where “2 or more racial groups or language minority groups each represent 20 percent or more of the political subdivision’s voting-age population” or “a single language minority group represents 20 percent or more of the voting-age population on Indian lands located in whole or in part in the political subdivision”;

(3) any change to redistricting in a state or subdivision where any racial group or minority language group that is not the largest racial group or language minority group in the jurisdiction and that represents 15 percent or more of the jurisdiction’s voting age population experiences a population increase over the preceding decade of at least 20 percent of its voting-age population in the jurisdiction;

(4) any change to requirements for documentation or proof of identity to vote or to register to vote such that the requirements will exceed or be more stringent than those under state law on the day before the date of enactment of the John R. Lewis Voting Rights Advancement Act of 2021, and, where a state imposes an identification requirement for receiving and casting a ballot in a federal election, if the State does not permit the individual to meet the requirement and cast a ballot in the election in the same manner as an individual who presents identification by permitting the in-person or vote by mail voters to submit a sworn statement attesting to their identity and eligibility to vote in lieu of identification;

(5) any change that reduces multilingual voting materials or alters the manner in which such materials are provided or distributed, where no similar reduction or alteration occurs in materials provided in English; or

(6) any change that reduces, consolidates, or relocates voting locations, including early, absentee, and election-day voting locations, including early, absentee, and election-day voting locations, or reduces days or hours of in person voting on any Sunday during a period occurring prior to the date of an election during which voters may cast ballots in such election, or prohibits the provision of food or non-alcoholic drink to persons waiting to vote in an election except where the provision would violate prohibitions on expenditures to influence voting: (a) in one or more census tracts wherein two or more language minority groups or racial groups represent 20 percent or more of the voting-age population of the political subdivision; or

(b) on Indian lands wherein at least 20 percent of the voting-age population belongs to a single language minority group.

(7) any change to the maintenance of voter registration lists that adds a new basis for removal from the list of active registered voters or that incorporates new sources of information in determining a voter’s eligibility to vote, wherein such a change would have a statistically significant disparate impact on the removal from voter rolls of members of racial groups or language minority groups that constitute greater than 5 percent of the voting-age population. This would apply only to political subdivisions where (a) two or more racial groups or language minority groups comprise 20 percent each of the voting age population or (b) on Indian lands, a single language minority group comprises at least 20 percent of the voting age population located within the subdivision. With respect to states, this provision would apply to those states with where at least 20 percent of the voting age population of the state or of a political subdivision within a state is composed of two or more racial groups or language minority groups, except the preclearance requirement apply only with respect to each such political subdivision.

New Section 4A(c)(1) sets forth a preclearance process for the covered practices described above. A state or political subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that the covered practice “neither has the purpose nor will have the effect of denying or

abridging the right to vote on account of race, color, or membership in a language minority group.” The covered practice cannot be implemented unless and until the court enters such judgment. A state or subdivision can forego pursuing the described court action and implement the covered practice if the Attorney General has not interposed an objection within 60 days. Section 4A(c)(1) provides that the Attorney General or any aggrieved citizen may file an action in a U.S. district court to compel any state or political subdivision to satisfy the preclearance requirements. The court must provide injunctive relief as a remedy unless the “voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting” is not a covered practice or the State or political subdivision has complied with the preclearance requirements.

New Section 4A(c)(2) provides that any covered practice defined in New Section 4A(b) that has the purpose of effect of diminishing the ability of citizens to elect their preferred candidates of choice on account of race, color, or language minority status is considered a denial or abridgement of the right to vote for purposes of this practice-based preclearance provision.

New Section 4A(c)(3) defines “purpose” as used in Section 4A to include any discriminatory purpose.

New Section 4A(c)(4) defines the purpose of Section 4A(c)(2) to protect the ability of citizens to elect their candidate of choice.

New Section 4A(d) grants authority to the Attorney General or a private party to file a civil action in federal district court to compel any state or locality to comply with this section. Such actions are to be heard before a three-judge panel. This subsection requires such a court to enjoin the challenged voting practice unless the challenged practice is not a covered practice or the jurisdiction has precleared the challenged practice.

New Section 4A(e) specifies that the calculation of the population of a racial or language minority group must be carried out using the methodology outlined in regulatory guidance.

New Section 4A(f) provides that Census Bureau data, whether estimates or actual enumerations, cannot be subject to challenge or review in court for purposes of any determinations under this section.

New Section 4A(g) defines “multilingual voting materials” as used in this section to mean “registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, provided in the language or languages of one or more language minority groups.”

Section 7. Promoting Transparency to Enforce the Voting Rights Act. Section 7 adds after Section 5 of the VRA a new Section 6. New Section 6 imposes new notice and disclosure by states and political subdivisions for three voting-related matters, including: (1) late breaking voting changes involving federal elections (e.g., changes in voting standards or procedures enacted 180 days before a federal election); (2) polling resources involving federal elections (e.g., information concerning precincts/polling places, number of voting age and registered voters, voting machines, and poll workers); and (3) redistricting, reapportionment, and other changes in voting districts involving federal, state, and local elections. Section 7 of the bill provides that public notice for each of these matters must be in a format that is accessible to voters with disabilities, including persons who have low vision or who are blind. Section 7 also provides that the right to vote of any person shall not be abridged or denied because that person failed to comply with any voting law change if the state or

political subdivision involved did not meet the applicable requirements of this section with respect to that change.

Section 8. Authority to Assign Observers. Section 8 of the bill amends Section 8 of the VRA. Section 8 of the VRA currently allows the Attorney General to certify the need for federal election observers in jurisdictions covered by the VRA's coverage formula where the Attorney General has received "meritorious complaints" from residents, local officials, or organizations that voting violations are likely to occur, or where the Attorney General determines that assignment of observers is "otherwise necessary" to enforce the Fourteenth or Fifteenth Amendment. These observers must be authorized to enter polling places to observe whether people who are entitled to vote are being permitted to do so, and to observe the processes in which votes are tabulated. VRA Section 8 gives the Director of the Office of Personnel Management the authority to designate and assign individuals to be observers.

Section 8 of the bill would expand the set of circumstances under which the Attorney General may seek to assign election observers and would transfer control of the observer program from OPM to DOJ. Section 8(a) of the bill would amend Section 8(a)(2)(b) of the VRA to allow the Attorney General to certify the need for observers in instances where doing so is considered necessary to enforce statutory provisions of the VRA and other federal law protecting citizens' voting rights, rather than solely to enforce the Fourteenth and Fifteenth Amendments. Section 8(b) would amend Section 8(a) of the VRA to permit the Attorney General to assign election observers in response to written meritorious complaints by residents, elected officials, or civic participation organizations that bilingual election requirements are likely to occur and if in the Attorney General's judgment, it is necessary to enforce those requirements. Finally, Section 8(c) of the bill would amend Section 3(a) of the Voting Rights Act to transfer the authority to assign and terminate election observers from OPM to DOJ.

Section 9. Clarification of Authority to Seek Relief. Section 9 amends several provisions of the VRA to add an explicit private right of action. Section 9(a) of the bill amends Section 10(b) of the VRA. Section 10(b) currently provides that the Attorney General may institute a civil action to enforce Section 10's prohibition on the enforced payment of poll taxes as a device to impair voting rights. Section 9(a) amends this provision to provide that, in addition to the Attorney General, there is a private right of action for anyone who has been injured by a violation of Section 10.

Section 9(b) of the bill amends Section 12(d) of the VRA. Section 9(b) of the bill adds a new section 12(d)(1) that provides, in addition to the Attorney General, for an aggrieved person to file an action for preventive relief, "[w]henever there are reasonable grounds to believe that any person has implemented or will implement any voting qualification or prerequisite to voting or standard, practice, or procedure that would deny any citizen the right to vote" in violation of the 14th, 15th, 19th, 24th, or 26th Amendments, the VRA (except for Section 4A), or another federal law that prohibits discrimination in the voting process on the basis of race or membership in a minority.

Section 9(c) of the bill amends Section 204 of the VRA to provide an explicit private right of action whenever "[t]here are reasonable grounds to believe that a State or political subdivision has engaged in or is about to engage in any act or practice" prohibited by the VRA's provisions prohibiting the denial of the right to vote because of failure to

comply with any test or device, durational residency requirements, or language-minority status.

Section 9(d) of the bill amends Section 301(a)(1) of the VRA to provide an explicit private right of action to enforce the 26th Amendment, which prohibits states and the federal government from denying the right to vote to anyone aged 18 and older.

Section 10. Preventive Relief. Section 10 of the bill amends Section 12(d) of the VRA to provide a new standard for preliminary relief in any action for preventive relief described in this subsection.

Specifically, Section 10 adds new section 12(d)(2)(A) would require that a court grant relief if it determines that the complainant has raised a serious question as to whether the challenged voting practice violations the VRA or the Constitution and, on balance, the hardship imposed on the defendant by the grant of the relief will be less than the hardship which would be imposed on the plaintiff if the relief were not granted.

Section 10 also adds new Section 12(d)(2)(B) would require the court to examine a number of factors in making the determination under new section 12(d)(2)(A), including (1) whether the voting act or practice in effect prior to the change was adopted as a remedy for a federal court judgment, consent decree, or admission regarding race discrimination in violation of the 14th or 15th Amendment, a violation of the 19th, 24th, or 26th Amendments, a violation of the VRA, or voting discrimination on the basis of race, color, or language-minority status in violation of any other federal or state law; (2) whether the voting act or practice in effect prior to the change served as a ground for dismissal or settlement of such a claim; (3) whether the change was adopted fewer than 180 days before the date of the election with respect to which the change is to take effect; and (4) whether the defendant failed to provide timely or adequate notice of the adoption of the change as required by federal or state law.

Finally, section 10 would also amend section 12(d) by adding new section 12(d)(3) which deems that a jurisdiction's inability to enforce its voting or elections laws, regulations, policies, or restricting plans, standing alone, shall not constitute irreparable harm to the public interest or to the interest of a defendant in an action arising under the Constitution or any federal law that prohibits discrimination in the voting process on the basis of race or membership in a language minority group, for the purposes of determining whether a stay of court or an interlocutory appeal is warranted.

Section 11. Relief for Violation of Voting Rights Laws. Section 11 provides a fix for federal courts' misapplication of the Purcell doctrine.

Under that doctrine, federal courts are cautioned not to issue decisions that would change election rules "too close" to an election. In practice, federal courts have applied that doctrine to consistently deny preliminary injunctions for voting rights plaintiffs even when they may have enough evidence to demonstrate a substantial likelihood of success on the merits.

Section 11(a)(1) of the bill defines a "prohibited act or practice" as one that violates 1) the 14th Amendment by creating an undue burden on the fundamental right to vote or by violating the 14th Amendment's Equal Protection Clause; 2) violates the 15th, 19th, 24th, or 26th Amendment or a number of specified federal voting statutes; 3) or one that violates any federal law prohibiting voting discrimination, including the Americans with Disabilities Act.

Section 11(a)(2) of the bill provides a rule of construction stating that noting in this

section shall be construed to diminish the authority of any person to bring an action under any federal law.

Section 11(a)(3) of the bill provides for the attorneys' fees pursuant to 42 U.S.C. § 1988.

Section 11(b) prohibits courts from denying, granting, staying, or vacating the issue of equitable relief sought pursuant to an action brought under any law listed in subsection 11(a) because of proximity of the action to an election. Under Section 11(b), the exception to this default rule is when the party opposing relief demonstrates, through clear and convincing evidence, that issuance of the relief would be so close in time to the election that it would cause irreparable harm to the public interest or impose serious burdens on the party opposing relief.

Section 11(b)(1) requires a court to give substantial weight to the public interest in expanding access to the ballot when reviewing whether to issue, stay, or vacate the grant of equitable relief and provides that state's generalized interest in enforcing its enacted laws is not a relevant consideration in determining whether relief is warranted.

Section 11(b)(2) also creates the presumption that the grant of equitable relief close to an election would not harm the public interest or burden an opposing party if such relief is sought within 30 days of the adoption or reasonable public notice of the challenged voting policy or practice, or more than 45 days before an election.

Section 11(c)(1) requires a court, when reviewing an application for a stay or vacatur of equitable relief sought pursuant to a law listed in subsection 11(a), to give substantial weight to the reliance interests of citizens who acted pursuant to the order for equitable relief under review. It would also prohibit a court from issuing a stay or vacatur order that has the effect of denying or abridging the right to vote of any citizen who acted in reliance on the underlying order being stayed or vacated.

Section 11(c)(2) prohibits a court from issuing a stay or vacatur unless it finds that the public interest will be harmed by the continuing operation of the equitable relief that has been granted or that compliance with such relief will impose serious burdens on the party seeking a stay or vacatur such that the burdens substantially outweigh the benefits to the public interest. In issuing a stay or vacatur of equitable relief, a court can set aside any factual findings in support of such relief only for clear error.

Section 12. Enforcement of Voting Rights By Attorney General. Section 12 of the bill amends Section 12 of the VRA by adding at the end a new subsection (g). New Subsection 12(g)(1) provides that whenever the Attorney General or a designee has reason to believe that any person may be in possession, custody, or control of any documents relevant to an investigation under the VRA or other federal voting rights statute, he or she may, prior to commencing an action, issue in writing and serve on such person an order requiring the production of such information.

New subsection 12(g)(2) set forth the contents of any order issued by the Attorney General under new subsection 12(g)(1).

New subsection 12(g)(3) sets forth the contents of any response to an order issued by the Attorney General under new subsection 12(g)(1).

New subsection 12(g)(4) sets forth judicial proceedings related to an order issued by the Attorney General under new subsection 12(g)(1).

Section 13. Definitions. Section 13 of the bill amends Title I of the VRA by clarifying several definitions related to the Native American voting population. The defined terms include "Indian," "Indian Lands," "Indian Tribe," "Tribal Government," and

“Voting-Age Population,” which are referred to in amended Section 4 of the VRA.

Section 14. Attorneys’ Fees. Section 14 of the bill adds at the end of Section 14(c) of the VRA, which provides definitions for the Act’s attorneys’ fee provision, a definition for “prevailing party” to mean “a party to an action that receives at least some of the benefit sought by such action, states a colorable claim, and can establish that the action was a significant cause of a change to the status quo.”

Section 15. Other Technical and Confirming Amendments. Section 15 of the bill makes technical and conforming amendments to Sections 3(c), 4(f), and 5 of the VRA.

Section 16. Severability. Section 16 adds a severability to clause to the bill, providing that if any part of the VRA or any amendments made by the Act, or any application of any part of the Act or amendments made by the Act, is held to be unconstitutional or is otherwise enjoined or unenforceable, the rest of the VRA, and the remainder of the Act and any amendments made by this Act, and the application of the provisions and amendment to any person or circumstance, and any remaining provisions of the VRA, shall not be affected by the holding.

Section 17. Grants to Assist with Notice Requirements Under the Voting Rights Act of 1965. Section 17(a) requires the Attorney General to make grants each fiscal year to small jurisdictions who submit applications for financial assistance to comply with the VRA’s notice requirements.

Section 17(b) requires a small jurisdiction seeking such a grant to file an application to the Attorney General containing such information as the Attorney General requires.

Section 17(c) defines a small jurisdiction to mean any political subdivisions with a population of 10,000 or less.

MEMORANDUM REGARDING THE INCLUSION OF CERTAIN PROVISIONS IN H.R. 4, THE “JOHN R. LEWIS VOTING RIGHTS ADVANCEMENT ACT OF 2021”—AUGUST 24, 2021

I. INTRODUCTION

The following is an analysis of key provisions included in H.R. 4, the “John R. Lewis Voting Rights Advancement Act of 2021.” This legislation will strengthen and revitalize the Voting Rights Act of 1965 (VRA) in the wake of the Supreme Court’s decisions in *Shelby County v. Holder* and *Brnovich v. Democratic National Committee* in light of the record developed before the House Judiciary Committee’s Subcommittee on the Constitution, Civil Rights, and Civil Liberties (Constitution Subcommittee) over the course of six hearings this year and seven hearings in the 116th Congress as well as the Committee on House Administration’s Elections Subcommittee.

H.R. 4 includes provisions addressing the following: (1) a geographic coverage formula to determine which jurisdictions should be subject to the VRA’s preclearance requirement that is broad enough to accurately capture the full extent of contemporary voting discrimination while accounting for the federalism and state sovereignty concerns expressed by the Court in *Shelby County*; (2) a practice-based coverage formula to complement the geographic coverage formula in order to cover jurisdictions where, because of demographic changes, the risk of voting discrimination is heightened even in the absence of a history of voting discrimination and to cover practices that are historically associated with voting discrimination; (3) a statutory standard for vote denial claims under Section 2 of the VRA in light of the Supreme Court’s recent decision in *Brnovich*; (4) the inclusion of a non-retrogression

standard in Section 2; (5) the creation of an explicit private right of action under the VRA; (6) the expansion of the causes of action available under the VRA to include violations of a broader spectrum of voting discrimination-related constitutional and statutory provisions; (7) a revision of the preliminary injunction standard applicable to actions under the VRA to make it easier for plaintiffs to obtain such relief; (8) a fix for federal courts’ misapplication of the *Purcell* doctrine, which counsels courts against granting preliminary injunctions or making other changes to election rules too close to an election; (9) greater notice and transparency requirements; (10) expanded bases for the assignment of federal election observers; and (11) expanded bail-in preclearance jurisdiction for federal courts. Congress’s constitutional authority to adopt these provisions remains broad even when accounting for the terms of the Supreme Court’s decisions in *Shelby County* and *Brnovich*.

II. THE VOTING RIGHTS ACT: A BRIEF SUMMARY OF KEY PROVISIONS

Below is a brief summary of the VRA’s key provisions to provide context for understanding the legislation’s provisions described later in this memorandum.

Section 2(a) of the VRA applies nationwide and prohibits any state or political subdivision from enacting any “voting qualification or prerequisite to voting or standard, practice, or procedure . . . in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color,” or on account of “member[ship] [in] a language minority group.” Section 2 thus prohibits measures that are discriminatory in purpose or in effect. Prohibited measures can include practices that affect the ability to cast a vote (such as through photo ID laws or by closing polling places) as well as redistricting that dilutes the voting power of minority citizens.

Section 2(b) of the VRA clarifies how to determine when there is a violation of Section 2(a) by providing that: “A violation of subsection (a) is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”

Section 3(a) of the VRA provides that a federal court may authorize the appointment of federal election observers by the Director of the Office of Personnel Management (OPM) to enforce the voting guarantees of the Fourteenth and Fifteenth Amendments in the context of an enforcement proceeding.

Section 3(c) of the VRA, known as the “bail-in” provision, allows courts to retain jurisdiction to supervise further voting changes in jurisdictions where the court has found violations of the Fourteenth or Fifteenth Amendments. If a jurisdiction is “bailed in,” it must submit any changes to its voting rules and procedures for approval either to the court or to DOJ.

Section 203 was added to the VRA by Congress in 1975 and contains a number of protections for members of “language minorities” (i.e., non-English speakers). It supplements Section 2 to prohibit voting discrimination against language minorities, including by requiring provision of language assistance to voters. It also added to the preclearance coverage formula to include jurisdictions that provided English-only voting materials where 5% or more of voting-age citizens were from a single language minority.

Section 4(b) of the VRA, known the “coverage formula,” determined which states or political subdivisions are required to submit changes to any voting laws for preclearance under Section 5 prior to their implementation. If a state is subject to preclearance, all of its political subdivisions are as well. As described in detail below, in 2013 the Supreme Court invalidated the coverage formula as unconstitutional in *Shelby County v. Holder*.

Section 5 of the VRA, known the “preclearance provision,” requires prior approval or preclearance of a proposed change to any voting law in any states or political subdivisions covered under Section 4(b). The Supreme Court’s decision in *Shelby County* effectively rendered Section 5 inoperative. A covered jurisdiction can comply with Section 5 by preclearing a proposed voting law change via two methods: administrative or judicial review.

Under administrative review, a covered jurisdiction can submit a proposed voting change to DOJ. If DOJ affirmatively indicates no objection to the proposed change, or if after 60 days DOJ has interposed no objection, the covered jurisdiction can implement the change.

Under judicial review, a covered jurisdiction can file suit against the United States or the Attorney General in the U.S. District Court for the District of Columbia for declaratory judgment, whereby a three-judge panel must be convened to hear the case (and with direct appeals to the Supreme Court). Unlike in a Section 2 case, in an action brought under Section 5, the burden is on the covered jurisdiction to establish that it does not violate the substantive prohibition in the preclearance provision.

Section 5 prohibits covered jurisdictions from implementing any changes to voting rules that have the purpose or effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. This standard is referred to as the “retrogression standard.” The Supreme Court has interpreted this substantive prohibition to mean that a proposed voting rule change cannot place minority citizens in a worse position to participate in the electoral process or elect a candidate of their choice than under the status quo. In this way, the standard for establishing whether a proposed change must be precleared differs from the standard for establishing a violation under Section 2 of the Act, even though the wording appears similar. Under the retrogression standard, a proposed voting change is entitled to preclearance, even if the current electoral system is potentially discriminatory under Section 2, so long as the change does not further increase the degree of discrimination against minority voters.

Sections 4(b) and 5 were originally set to expire after 5 years, but Congress reauthorized them several times since the VRA’s original enactment in 1965. Congress last reauthorized the VRA in 2006, when it extended these provisions for an additional 25 years.

Section 8 of the VRA allows DOJ to certify the need for federal election observers in covered jurisdictions where the Attorney General has received “meritorious complaints” from residents, local officials, or organizations that violations of the VRA are likely to occur, or where the Attorney General determines that assignment of observers is “otherwise necessary” to enforce the Fourteenth or Fifteenth Amendment. These observers must be authorized to enter polling places to observe whether people who are entitled to vote are being permitted to do so, and to observe the processes in which votes are tabulated.

Section 12(d) of the VRA provides the Attorney General with the authority to institute a legal action for preventive relief, including temporary or permanent injunctions, restraining orders, or other relief, whenever any person has engaged in, or there are reasonable grounds to believe that any person is about to engage in, any violation of the VRA. This provision has also been interpreted to provide an implied right of action for private plaintiffs.

III. CONGRESS'S CONSTITUTIONAL AUTHORITY TO DEVISE PROTECTIONS AGAINST RACIAL DISCRIMINATION IN VOTING

Congress has broad constitutional authority to protect voting rights. Specifically, this authority is derived from its powers to enforce the guarantees of the Fourteenth and Fifteenth Amendments. Additionally, Congress has the authority to ultimately determine the time, place, or manner of congressional elections under the Elections Clause.

The Fourteenth and Fifteenth Amendments to the Constitution confer authority on the Congress to pass laws that regulate federal, state, and local elections to protect voting rights. Section 1 of the Fourteenth Amendment provides that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” Section 2 requires members of Congress to be apportioned among the states “according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed.” Section 5 vests Congress with the “power to enforce, by appropriate legislation, the provisions of this article.”

The Fifteenth Amendment prohibits racial discrimination in the right to vote. Section 1 of the Amendment provides that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.” Like the Fourteenth Amendment, Section 2 of the Fifteenth Amendment provides Congress with the “power to enforce this article by appropriate legislation.”

The Elections Clause also provides Congress additional authority to adopt voting rights protections. Article I, Section 4, Clause 1 of the Constitution provides that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.” While the Elections Clause grants the States the authority to regulate the time, place, and manner for holding elections for Representatives and Senators, it vests Congress with the ultimate authority to determine the election “Regulations” for those offices, with only one explicit textual exception. As the Supreme Court, in an opinion by Justice Antonin Scalia, noted, the “Clause’s substantive scope is broad. ‘Time, Places, and Manner,’ we have written, are ‘comprehensive words,’ which ‘embrace authority to provide a complete code for congressional elections.’”

The Supreme Court’s earlier decisions upholding the constitutionality of the VRA appear to have understood Congress’s constitutional authority to protect voting rights in broad terms. In *South Carolina v. Katzenbach*, the first case to uphold the VRA and its preclearance regime, the Court appeared to apply a “rationality” test for measures enacted to enforce the Fifteenth Amendment, noting that Congress need only show

that it had a legitimate end in adopting that law and that the means to achieve that “are plainly adapted to that end.” The Supreme Court decided *Katzenbach* in 1966 and maintained the same standard of review for the VRA’s preclearance provisions, despite several challenges, and, at least as to the scope of Congress’s Fifteenth Amendment authority, *Katzenbach* remains in effect.

One caveat as to the scope of congressional authority over voting rights legislation has arisen due to Supreme Court interpretations of Congress’s authority under the Fourteenth Amendment. In a series of cases starting in the late 1990’s that were unrelated to voting rights, the Court began to place limits on Congress’s ability to adopt legislation enforcing the Fourteenth Amendment’s guarantees. In *City of Boerne v. Flores*, the Court struck down as unconstitutional as applied to states the Religious Freedom Restoration Act, a statute that Congress passed to enhance protections for religious minorities and other minority groups. It did so based on an interpretation of Section 5 of the Fourteenth Amendment that viewed Congress’s authority to enact legislation as primarily remedial in nature. Given this remedial nature, the Court concluded that congressional action in this area had to be congruent and proportional to the injury being addressed. The “congruence and proportionality” test adopted by the Court has raised some question as to the scope of Congress’s authority to adapt voting rights legislation—particularly with respect to language minorities—given the similarities in wording between Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment.

Nonetheless, existing precedent continues to establish Congress’s broad authority to adopt legislation to protect voters against racial discrimination. As noted, the Court has not overturned *Katzenbach* or related cases upholding the VRA’s preclearance scheme and the substantial deference that the Court gave to Congress’s exercise of its authority to pass legislation enforcing the Fifteenth Amendment. Thus, Congress can continue to adopt legislation that is rationally related to its authority to protect against voter discrimination.

The Elections Clause also remains an oft-overlooked source of congressional authority to prescribe voting rights protections—though its reach is limited to federal elections. Professor Franita Tolson previously testified twice on the subject of Congress’s authority to protect voting rights under the Elections Clause. In her testimony, Professor Tolson argued that enacting protections pursuant to the Elections Clause provides several benefits as it “avoids many of the traps that have constrained congressional power under the Reconstruction Amendments.” She observed that because it “depriv[es] states of the final policymaking authority that is the hallmark of sovereignty, the [Elections] Clause is impervious to the federalism concerns that have constrained congressional action under the Fourteenth and Fifteenth Amendments.” Moreover, Professor Tolson noted that the Elections Clause is further distinguished from the Reconstruction Amendments because it “does not require any evidence of discriminatory intent in order for Congress to intervene, providing further justification for a legislative record that shows that states acted with discriminatory effect or in ways that otherwise abridge or deny the right to vote.”

Finally, Article IV’s Guarantee Clause may provide Congress additional authority to protect minority voting rights as a means of ensuring the guarantee that every state has a republican form of government. That Clause requires that the “United States shall

guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”

IV. KEY ISSUES ADDRESSED BY H.R. 4

A. *New Geographic Coverage Formula to Revitalize Section 5 Preclearance Post-Shelby County*

On June 25, 2013, in *Shelby County v. Holder*, the Supreme Court struck down as unconstitutional the coverage formula in Section 4(b) of the VRA, effectively neutering the Act’s Section 5 preclearance provision. Citing its decision in an earlier case called *Northwest Austin Municipal Utility District One v. Holder*, the Supreme Court held that Congress must justify the unequal burdens placed on state sovereignty by the VRA’s preclearance regime based on “current needs” and that it had to demonstrate that the coverage formula was “sufficiently related to the problem that it targets.” The Court emphasized the principle of “equal sovereignty” of the states, highlighting that “a departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.” In other words, the Court believed that Congress was required to further justify the coverage formula because it applied the burden of the VRA’s preclearance requirement to some states but not others.

The Court struck down the VRA’s coverage formula based on its conclusion that Congress had failed to demonstrate that the coverage formula—first enacted in 1965—was sufficiently connected to the present condition of voting rights in the covered states, and because Congress could not justify the disparate burdens placed by VRA’s preclearance provision on the sovereignty of some states and not others.

Significantly, the Court invited Congress to “draft another formula based on current conditions.” The Court went on to note that, “[o]ur country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.”

To that end, H.R. 4 includes a geographic coverage formula that would cover jurisdictions as follows. A state and all political subdivisions in that state would be covered for 10 years if, looking back 25 years, there were 15 or more violations in that state, or if there were 10 or more violations in that state if at least one of those violations was committed by the state itself (as opposed to a political subdivision). A state is also covered if there are 3 or more violations in that state when the state itself controls elections in the state or its political subdivisions. Separately, a political subdivision could be covered for 10 years if it committed 3 or more violations in the preceding 25 years. Drawing from *Shelby County*, any coverage formula must reflect current needs, though the Court left unanswered the question of how “current” is sufficiently “current.” The formula in H.R. 4 reasonably meets this test because it is a dynamic and self-updating formula, and preclearance coverage would only last for 10 years for any given jurisdiction, thereby always reflecting contemporary conditions. Moreover, the 25-year lookback period reflects two redistricting cycles and six presidential elections, enough to ensure that the coverage formula only captures jurisdictions that have engaged in a pattern of voting discrimination, rather than those that may have committed a “one-off” violation.

B. *Practice-Based Coverage*

“Known practices coverage,” also known as practice-based preclearance, is a form of

preclearance coverage formula that applies to certain voting law changes that have historically been associated with racial discrimination. This is distinct from geographic-based preclearance, under which coverage is determined based on a jurisdiction's history of voting rights violations. One potential drawback of a geographic-based coverage formula is that it does not cover jurisdictions with significant emerging minority populations, where the risk of voter suppression efforts against such populations is heightened but there is no documented history of voting rights violations.

This has proven to be problematic as jurisdictions that do not have a documented history of voting rights violations have nonetheless responded to surges in the minority population by turning to practices historically utilized to discriminate against or disenfranchise minority voters. Practice-based preclearance addresses this gap in coverage by subjecting certain specific practices with a proven historical association with discrimination to preclearance. Moreover, such a practice-based coverage formula could be limited in some instances to those jurisdictions that, based on demographic changes, are most likely to engage in voter suppression efforts. Unlike the VRA's currently defunct preclearance coverage formula, practice-based preclearance would apply to states and localities nationwide and not just to certain states and political subdivisions.

As such, H.R. 4 includes a practice-based preclearance regime to supplement geographic-based preclearance. Specifically, H.R. 4 includes a practice-based preclearance provision that covered jurisdictions engaged in one of several categories of practices, including changes to voter ID requirements to be more stringent and changes to multilingual voting materials when no such similar change occurs in materials provided in English. Other categories of voting procedures and practices are subject to preclearance only in political subdivisions where certain demographic thresholds are met. For instance, changing from single member districts to at-large elections, redistricting, and the consolidation or relocation of polling places could be covered practices subject to preclearance in jurisdictions where two or more racial groups or language minority groups make up 20 percent or more of a political subdivision's voting-age population.

C. Clarifying Section 2 In Response to Brnovich v. Democratic National Committee

Prior to 2013, Section 2 had largely been used to challenge state and local efforts that resulted in the dilution of the effectiveness of minority citizens' votes, rather than in the outright denial of the ability to vote. These "vote dilution" cases mostly concern challenges to the drawing of legislative districts or at-large voting systems. In *Thornburg v. Gingles*, the Supreme Court outlined a non-exhaustive list of factors that a court should consider in determining whether, under the totality of the circumstances, a challenged voting rule violated Section 2's "results test" as established under subsection 2(b). In evaluating these "vote dilution" claims, courts were required to apply the Gingles factors, which were geared toward consideration of such "vote dilution" claims.

Since 2013, in the effective absence of preclearance in the wake of *Shelby County*, voting rights plaintiffs have been forced to rely on Section 2 litigation to challenge discriminatory voting rules after they had been implemented. These kinds of claims were "vote denial" claims—i.e., those claims alleging that the discriminatory effect of a voting rule or practice was such that it effec-

tively denied minority citizens the equal opportunity to vote compared to non-minority citizens. Until the *Brnovich* decision, the Supreme Court had never addressed how a court should assess "vote denial" claims under Section 2's results test, partly because there were relatively few such cases while preclearance was in effect.

In the absence of Supreme Court guidance, a number of federal appeals courts had attempted to articulate how the results test would apply to vote denial claims under Section 2. For example, the Fourth, Fifth, Sixth and Ninth Circuits articulated a two-part test: (1) the challenged voting rule must impose a discriminatory burden on members of the protected class, meaning that they have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice; and (2) the burden must in part be caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class.

On July 1, 2021, the Supreme Court decided the consolidated case of *Brnovich v. Democratic National Committee and Arizona Republican Party v. Democratic National Committee*. In a divided 6-3 opinion authored by Justice Samuel Alito and joined by Chief Justice John Roberts and Justices Clarence Thomas, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett, the Court upheld two Arizona measures challenged under Section 2 of the VRA. One challenged measure required that voters cast their ballots in their assigned precinct, and any ballots cast out of precinct had to be discarded. The other measure at issue was a criminal statute making it a felony for a third party to collect early ballots from voters (described by some as "ballot harvesting"). Plaintiffs had alleged that these voting rules violated Section 2's results test and that the third-party ballot collection statute also was motivated by a discriminatory purpose.

At issue in the case was not just the legality of the two challenged Arizona measures, but the impact that the Court's decision may have on future Section 2 vote denial claims alleging that a facially neutral voting practice governing the time, place, or manner of an election denied the right of minority citizens to vote. The full impact of the Court's decision on these types of Section 2 vote denial claims remains to be seen, but it appears from initial analyses that the *Brnovich* decision will significantly curtail plaintiffs' ability to bring or prove such claims, which could be especially problematic in the effective absence of preclearance.

Although the majority in *Brnovich* expressly disclaimed the notion that it was creating a new and narrow results test for assessing Section 2 vote denial claims, it set forth what it characterized as "guideposts" for considering such claims, all of which, individually and taken together, significantly narrowed the scope of Section 2 for vote denial claims and will make it harder for future Section 2 vote denial claims to prevail using the existing results test. In the majority's view, the interpretive touchstone for Section 2's statutory language is the term "equally open" as used in Section 2 and that in evaluating whether a plaintiff has established a violation under Section 2 (i.e., that the challenged practice "results in" discrimination), a court must examine the jurisdiction's entire election system from a holistic perspective to determine whether voting is "equally open" to minorities.

In her dissent, Justice Elena Kagan, joined by Justices Stephen Breyer and Sonia Sotomayor, sharply criticized the majority opinion, writing that "Section 2 of the [VRA] remains, as written, as expansive as

ever" and accusing the Court of crafting "its own set of rules, limiting Section 2 from multiple directions" and giving "a cramped reading to broad language." Justice Kagan further found it "tragic . . . that the Court has (yet again) rewritten—in order to weaken—a statute that stands as a monument to America's greatness, and protects against its basest impulses."

In Justice Kagan's reading, Section 2: (1) applies to any voting rule; (2) prohibits both denial and abridgement of a citizen's voting rights based on race; (3) requires a court to focus its inquiry on the effects of a challenged voting rule and whether that rule results in racial discrimination, not on the reasons why public officials enacted that rule; (4) concerns itself with discrimination that results in inequality of the opportunity to vote, which can arise from facially neutral rules and not just targeted ones; (5) is violated when an election rule, operating against the backdrop of historical, social, and economic conditions, makes it harder for minority citizens to vote than for others; and (6) requires the state or locality imposing the challenged rule to show that any strong governmental interest justifying the challenged rule is the least discriminatory rule necessary to satisfy the state interest. In short, Justice Kagan wrote, Section 2 directs courts "to eliminate facially neutral (as well as targeted) electoral rules that unnecessarily create inequalities of access to the political process."

Although *Brnovich* is a deeply troubling decision, one silver lining to the decision is that it left Congress with the authority to respond with a legislative fix for the damage that the Court has inflicted on Section 2. Because the Court's decision is based on its interpretation of a statute drafted by Congress, rather than on constitutional principles restricting Congress's authority to legislate, Congress can amend Section 2 to reverse the Court's decision in *Brnovich*.

There were at least three potential approaches to "fixing" the issues created by the *Brnovich* decision that were considered. All three would essentially create a separate standard for courts to apply when evaluating vote denial (the situation in *Brnovich*) and vote dilution claims under Section 2.

Under the approach ultimately included in H.R. 4, Congress clarifies that as to vote dilution claims, courts must continue to apply the framework of the *Gingles* decision to such claims. The legislation then creates a separate test for courts to apply to vote denial claims that would require a plaintiff to prove a violation of Section 2(a) by establishing that the challenged voting practice imposes a discriminatory burden on members of a class of citizens protected by Section 2(a). Under this standard, the bill codifies a separate set of detailed factors that courts must consider when evaluating whether, under the totality of the circumstances, the challenged voting practice "results in" a discriminatory burden—while also precluding courts from considering the "guideposts" described by the court in *Brnovich*.

Other possible approaches that were considered but not ultimately included would have involved creating a burden-shifting test for vote denial claims under Section 2. Like the previous approach, this approach would have largely preserved Section 2(b) as applied to vote dilution claims, which were not at issue in *Brnovich*. Under one potential burden-shifting approach for vote denial claims, a plaintiff could establish a *prima facie* case by demonstrating that a challenged voting rule or practice interacts with historical and socioeconomic factors to "result in" a disparate burden on the opportunities enjoyed by members of a class of citizens

protected by Section 2(a) to participate in the political process relative to other members of the electorate. The burden then shifts to the defendant jurisdiction to demonstrate by clear and convincing evidence that the challenged rule is specifically tailored to materially advance an important and particularized government interest. If the state or political subdivision meets its burden, the burden would then shift to the plaintiff to show by a preponderance of the evidence that the state or political subdivision could have implemented a procedure that furthered the government's interest through a less burdensome means.

Similarly, a third potential approach that was considered but not ultimately included was suggested by Professor Nick Stephanopoulos, who appeared before the Constitution Subcommittee at its hearing held on July 16, 2021. His proposal would import the disparate impact standard used in other areas of civil rights law for vote denial claims. Under his proposed standard for vote denial claims, a plaintiff would have to show that an electoral practice causes a statistically significant racial disparity. If the plaintiff meets that burden, then the burden would shift to the jurisdiction that imposed the challenged practice to demonstrate that the practice is necessary to achieve a strong state interest. The burden would then shift back to the plaintiff to demonstrate that the interest could be achieved through less discriminatory means, suggesting that the state's asserted interest was pretextual.

D. Section 2 Retrogression Standard

As noted earlier, the substantive standard applied when assessing a proposed voting change under the Section 5 preclearance regime is the retrogression standard—i.e., whether the proposed voting change makes minority citizens worse off than the status quo in terms of their ability to vote. If the proposed change is retrogressive, then it cannot be precleared.

H.R. 4 imports this substantive standard into Section 2 to apply to cases where an already-enacted voting law or rule has a retrogressive effect. In such cases, a Section 2 retrogression standard would help to prevent the harm of retrogression in the absence of preclearance in non-covered jurisdictions. This measure also provides an additional basis for finding a Section 2 violation.

E. Enhancing Section 3(c) Bail-in Jurisdiction

Section 3(c) of the VRA, known as the “bail-in” provision, allows courts to retain jurisdiction to supervise further voting changes in jurisdictions where the court has found violations of the Fourteenth or Fifteenth Amendments. If a jurisdiction is “bailed in,” it must submit any changes to its voting procedures for approval either to the court or to the DOJ. In practice, however, plaintiffs face a high, perhaps insurmountable, burden in proving violations as federal courts have determined that Section 3(c) requires a finding of intentional discrimination. Thus, a jurisdiction may have a history of VRA violations due to implementing voting laws with a discriminatory effect, but because there may not have been a constitutional violation, which requires a showing of discriminatory intent, courts cannot invoke Section 3(c) to subject a jurisdiction to preclearance as a remedy. Additionally, even when there is substantial evidence that government officials were motivated by discriminatory intent, courts have proven reluctant to find that such officials engaged in purposeful discrimination. Moreover, since the Shelby County decision, some courts have suggested that not all violations of the Fourteenth and Fifteenth Amendments support Section 3(c) bail-in coverage. For these reasons, courts have rarely in-

voked their authority under Section 3(c) to impose bail-in preclearance on a jurisdiction.

As a result, H.R. 4 enhances the “bail-in” provision in Section 3(c) of the VRA by permitting courts to impose a preclearance requirement on a case-by-case basis on jurisdictions where there have been violations of the VRA and other federal statutory prohibitions against discrimination in voting—in addition to instances where there have been violations of the Fourteenth or Fifteenth Amendment. This gives federal courts more flexibility and opportunity to impose bail-in preclearance on a jurisdiction while avoiding the federalism concerns that the Supreme Court articulated in Shelby County, given the remedial and case-by-case nature of bail-in coverage.

F. Promoting Transparency to Enforce the Voting Rights Act

Beyond effectively gutting the VRA's preclearance mechanism, the Shelby County decision also undermined the ability of DOJ and the general public to have notice of any changes to voting laws, policies, or procedures. In addition to being an effective enforcement mechanism, preclearance had functioned as an effective notice regime. To address this lack of transparency post-Shelby County, the legislation imposes a notice and disclosure requirement on states and political subdivisions for three voting-related matters, including: (1) late breaking voting changes involving federal elections (e.g., changes in voting standards or procedures enacted 180 days before a federal election); (2) polling resources involving federal elections (e.g., information concerning precincts/polling places, number of voting age and registered voters, voting machines, and poll workers); and (3) redistricting, reapportionment, and other changes in voting districts involving federal, state, and local elections. The legislation also ensures that public notice for each of these matters must be in a format that is accessible to voters with disabilities such as those who have low vision or who are blind. This type of reporting requirement imposes a low burden on states and plainly bears a logical relation to facilitating Congress's ability to ensure proper enforcement of the law.

G. Expanding the Authority to Assign Federal Elections Observers

Under Section 8, the Attorney General can certify the need for OPM to assign federal observers to jurisdictions covered by Section 5 of the VRA when the Attorney General “received written meritorious complaints . . . that efforts to deny or abridge the right to vote . . . on account of race or color . . . are likely to occur” or when the Attorney General considered the assignment of observers “necessary to enforce the guarantees of the 14th or 15th amendment.” These observers are authorized to “(1) enter and attend at any place for holding an election in such subdivision for the purpose of observing whether persons who are entitled to vote are being permitted to vote; and (2) enter and attend at any place for tabulating the votes cast at any election held in such subdivision for the purpose of observing whether votes cast by persons entitled to vote are being properly tabulated.” They are also authorized to conduct investigations and report to the Attorney General. Additionally, under Section 3(a) of the VRA, federal courts are also currently empowered to authorize the appointment of federal observers by OPM to enforce the voting guarantees of the Fourteenth and Fifteenth Amendments.

As Jon Greenbaum, Chief Counsel for the Lawyers' Committee for Civil Rights Under Law, noted in his testimony before the Constitution Subcommittee at a hearing in May 2021, an oft overlooked side effect of the

Shelby County decision is the reduced number of federal observer appointments under Section 8 of the VRA. DOJ has interpreted the Shelby County decision as barring the use of the coverage formula to send observers under Section 8 of the VRA. In place of full-fledged observers, DOJ has relied on “monitors” to ensure that jurisdictions with a history of discriminatory voting practices hold elections in a fair manner that does not disenfranchise minority voters. Unfortunately, these monitors do not possess the same authority as an observer, and as such jurisdictions are not required to provide them the same access to the voting process as observers. Moreover, when operating as intended, the authority of the Attorney General and federal courts to appoint observers under the VRA is generally limited to circumstances where such observers are necessary to enforce the Fourteenth and Fifteenth Amendments.

In order to address this problem, H.R. 4 expands the circumstances under which both federal courts and the Attorney General could certify the need for federal election observers under Sections 3(a) and 8 of the VRA, respectively. Section 3(a) is amended to permit federal courts to have observers assigned where there are violations of the VRA or any other federal law prohibiting discrimination in voting on the basis of race, color, or language minority status, supplementing its authority to do so to enforce the voting guarantees of the Fourteenth and Fifteenth Amendments. Similarly, the Attorney General's authority to certify the need for observers is expanded to include instances when they are considered necessary to enforce statutory provisions prohibiting race, color, or language-minority discrimination in voting and for the purpose of enforcing bilingual election requirements.

The legislation also amends the VRA so that the Attorney General, rather than OPM, is authorized to control the appointment and termination of federal election observers. This is intended to ease administrative burdens on OPM and improve the appointment process, given that DOJ possesses the voting rights expertise necessary to evaluate candidates' suitability to act as observers.

H. Strengthening the Effectiveness of VRA Enforcement Actions

As noted by many Majority witnesses at most of the hearings before the Constitution Subcommittee regarding the VRA, Section 2 litigation has many drawbacks, including the time, expense, and drain on resources that such litigation entails. Most significantly, these witnesses noted that the biggest drawback to Section 2 litigation is that it is difficult, if not impossible, to stop the harm to voters that a discriminatory voting law, policy, or practice can inflict before such a measure is implemented. Being able to stop harm to voters before a discriminatory voting measure took effect was one of the primary benefits of preclearance.

Part of the problem for those seeking to vindicate their rights under the VRA using Section 2 litigation is that because courts are reluctant to grant a preliminary injunction and voting rights litigation is often lengthy, several elections for federal, state, and local offices could occur under voting laws or procedures that are later found by the court to be discriminatory. Thus, thousands of minority voters often remain disenfranchised before a court renders a decision on the merits of a case brought under Section 2.

For example, one witness testified during the 116th Congress that “Section 2 cases take a substantial amount of time to litigate, leaving discriminatory voting practices in place for months or years before they are

ultimately blocked or rescinded,” with the average time to fully litigate a case to resolution being more than a year and a half. Furthermore, he testified that because elections take place during the time that Section 2 litigation is pending, “government officials are often elected under election regimes that are later found to be discriminatory—and there is no way to adequately compensate victims of voting discrimination after-the-fact.” As an example, he cited the ACLU’s litigation challenging a sprawling North Carolina voter suppression law, which took 34 months to litigate from filing the complaint to a ruling by the U.S. Court of Appeals for the Fourth Circuit, with the 2014 general election taking place in the interim. As he noted, “almost 200 federal and state officials in North Carolina were elected under a discriminatory regime that the Fourth Circuit found ‘target[ed] African Americans with almost surgical precision’” and that although the law was ultimately struck down, “there is no way to now compensate the African-American voters of North Carolina—or our democracy itself—for that gross injustice.”

To address these drawbacks inherent to Section 2 litigation, H.R. 4 strengthens the ability of Attorney General and private parties to bring enforcement actions by amending the VRA to enhance the standard for preliminary injunctions; to address federal courts undue reliance on the *Purcell* principle when considering whether to grant equitable relief; to expand the scope of the existing cause of action available under the VRA; and to grant private parties an explicit private right of action to obtain equitable relief.

1. Enhancing the Standard for Preliminary Injunctions

The legislation amends the VRA to enhance the standard for preliminary injunctions by requiring a court considering a preliminary injunction motion in Section 2 cases to grant injunctive relief to the plaintiff if the court determines that the plaintiff has raised a “serious question” regarding the lawfulness of the challenged voting rule or practice, and if the court determines that the balance of interests and hardships favors the plaintiff.

This standard departs from the traditional standard for obtaining a preliminary injunction, under which a plaintiff must show that he or she “is likely to succeed on the merits” and is likely to suffer “irreparable harm” absent an injunction and must demonstrate that the overall balance of interests tilts in his or her favor. The Supreme Court, however, has repeatedly held that Congress may alter common-law standards for seeking equitable relief so long as the “alternative comports with constitutional due process,” particularly in cases presenting issues of public interest.

2. Addressing the *Purcell* Principle

Compounding the difficulties and relative ineffectiveness of relying solely on Section 2 litigation are some federal courts’ undue reliance on what is known as the *Purcell* principle, named for the Supreme Court decision in which it was articulated, *Purcell v. Gonzalez*. Briefly stated, the *Purcell* principle holds that courts should not change election rules in the time period close to an election because it could cause voter confusion or problems for election administration officials.

As Professor Justin Levitt noted in his September 2019 testimony, “[r]esponsive litigation often features substantial discovery battles and extended motion practice, all of which often precedes the awarding of even preliminary relief. Such preliminary relief, according to experienced litigators, is itself

quite rare in affirmative voting rights litigation, under the existing standard.” Professor Levitt further noted that the rarity of preliminary injunctive relief “only increases in the period shortly before an election—when immediate rulings are most necessary to prevent harm—based in part on the Supreme Court’s admonishment that the judiciary should be particularly wary of enjoining enacted electoral rules under traditional equitable standards when there is ‘inadequate time to resolve . . . factual disputes’ before the election proceeds.”

The legislation addresses this problem by amending the VRA to require a court evaluating any action for equitable relief under Section 2 to shift the burden on to the jurisdictions opposing the requested relief to prove that compliance with such relief would be too burdensome. Courts are required to not consider the proximity of the action to an election to be a valid reason to grant or deny such relief, unless the party opposing the relief—typically a State or political subdivision thereof—meets the burden of proving by clear and convincing evidence that the issuance of the relief would be so close in time to the election as to cause irreparable harm to the public interest or that compliance with such relief would impose serious burdens on the opposing party.

3. Empowering Private Parties by Providing an Explicit Cause of Action

Currently, the VRA expressly authorizes only the Attorney General to seek preventive relief, including preliminary injunctions. Although federal courts have interpreted the VRA to provide private parties the ability to seek such preventive relief, some courts have begun to express doubt about whether such a cause of action exists, including Justice Gorsuch in a concurring opinion in the *Brnovich* case. To address this problem, the legislation explicitly provides for a private right of action under the VRA, as H.R. 4 from the 116th Congress did.

V. THE CONTINUING NEED FOR A REVITALIZED VOTING RIGHTS ACT

A. Congressional Consideration of Voter Suppression Efforts Post-Shelby County

During the 116th Congress, two subcommittees, the Committee on the Judiciary’s Subcommittee on the Constitution, Civil Rights, and Civil Liberties and the Committee on House Administration’s Subcommittee on Elections, conducted a series of hearings to examine the landscape of voting in America following the Supreme Court’s decision in *Shelby County v. Holder*, current barriers to voting, and potential remedies. During these hearings, Congress heard testimony from leading civil rights advocates and organizations that described a process akin to evolution whereby State and local efforts to discriminate against minority voters have changed over time in response to federal efforts to provide a remedy. Accordingly, witness testimony described these barriers to voting in terms of “generations” to best capture the fact that voter discrimination continues to persist over time despite changing form.

“First generation” barriers: These barriers include poll taxes, literacy tests, and other devices meant to overtly disenfranchise racial minorities by preventing them from registering and voting. States and localities enacted them following the end of the Reconstruction Era. The VRA was initially passed to address these barriers.

“Second generation” barriers: These barriers include racially gerrymandering electoral districts, adopting at-large election districts instead of smaller, single-member individual electoral districts, and annexing another political subdivision. States and lo-

calities enacted these barriers to blunt the impact of minority voters on the outcome of an election by diluting or underrepresenting the strength of minority voters. The VRA was amended by Congress to forbid these practices, though they remain a threat to voting rights today.

“Third generation” barriers: These barriers include adopting procedures to make registering to vote more difficult for language minorities, placing burdensome restrictions on third-party voter registration activities, moving or closing down polling places to increase the difficulty for minorities to vote, and enacting voter ID laws. These barriers are designed to make voting more onerous for minority voters.

Over the course of these hearings, the witnesses presented extensive evidence supporting the conclusion that voter discrimination remains a persistent problem. Furthermore, the Constitution Subcommittee heard testimony that the Supreme Court’s decision in *Shelby County* has allowed these evolving barriers to minority voting to proliferate further.

At the time of the hearings, at least 23 states had enacted restrictive voter laws since the *Shelby County* decision including strict voter ID laws; barriers to voter registration, such as requiring proof of citizenship documents, allowing challenges of voters on the voter rolls, and unfairly purging voters from the voter rolls; reductions in early voting; and the moving or elimination of polling places. Witness testimony particularly highlighted ongoing efforts at voter discrimination in several states that were previously covered by the VRA’s preclearance formula: Texas, Georgia, North Carolina, and Alabama.

In Texas, within just hours of the *Shelby County* decision, the state announced it would implement its voter ID law despite a federal court having ruled that the same law could not receive preclearance due to its effects on minority voters. Other examples of voting barriers in Texas included the reinstatement of at-large voting districts; criminal and civil penalties for so-called “voter fraud,” including for errors on voter registration forms; widespread purging of voters from the rolls, including a policy targeting naturalized citizens; a failure to comply with the National Voter Registration Act; election judges and polling officials engaging in discrimination against and hostility toward minority voters; not processing voter registration of minority voters; last-minute changes to polling sites and assigning inconvenient polling sites to minority voters; long lines; nonfunctioning voting equipment; elimination of straight-ticket voting; and intimidation by state troopers and harassment of African American voters by vigilante groups.

In Georgia, following *Shelby County*, discriminatory barriers to voting included attacks on third party registration; restrictive voter ID laws; the closure of hundreds of precincts; database challenges that impacted legitimate registrations; voter purges of more than a million voters; a flawed process of “exact match” that impacted 53,000 people’s registrations; undertrained and under-resourced election staff who could not meet the needs of voters; long lines; policies that resulted in naturalized citizens having to go to court for their voting rights; lack of ballots in languages other than English for language minority voters; broken voting machines; inadequate distribution of voting machines; disparate application of state laws between counties and inconsistent application of the provisional ballot system; misapplied or miscommunicated district lines (forcing do-over elections and disqualifying candidates who would have otherwise been

eligible); and high rates of rejecting absentee ballots.

In North Carolina, after the Shelby County decision, the legislature passed an omnibus voter restriction law that the U.S. Court of Appeals for the Fourth Circuit would later describe as “the most restrictive voting law North Carolina has seen since the era of Jim Crow” with “provisions [that] target African Americans with almost surgical precision.” It included a ban on paid voter registration drives, the elimination of same-day voter registration, a reduction of early voting by a week, the elimination of the option of early voting sites at different hours, and the reduction of satellite polling sites for voters with disabilities and elderly voters. Other examples of barriers to voting included gerrymandering, voter roll purges, a voter ID constitutional amendment, reductions to early voting, long lines, issues with voting machines and curbside voting, and poll worker misconduct.

In Alabama, after the Shelby County decision, discriminatory barriers to voting included a photo ID law, the closure of DMV offices—which were needed to acquire the necessary photo ID—in areas with the highest proportions of Black Americans, restrictive absentee ballot rules, the requirement of documents to prove citizenship to register to vote, polling site closures, untrained poll workers, and felon re-enfranchisement issues.

In describing these voting barriers in specific states, the witnesses’ testimony pointed to a pattern demonstrating that certain voting practices, enacted across multiple states in the post-Shelby County era, consistently resulted in minority voter disenfranchisement, including:

Restrictions on voter registration, early voting, and voting by mail;

Restrictive voter ID laws;

Voter roll purges;

Issues with polling sites, such as the closure and relocation of polling sites, long lines, intimidation of voters primarily in communities of color, locating polling places extremely far from where a resident lives—especially in Native American communities, and denying limited English proficient voters the right to language assistance;

Vote dilution through redistricting plans, transitions to at-large voting systems, and by other means; and

Obstacles to restoring the right to vote for formerly incarcerated individuals

One witness summarized the numerous impacts of Shelby County on voting rights as including the following:

A resurgence of discriminatory voting practices, including practices motivated by intentional discrimination, especially in jurisdictions that were once covered by Section 5 of the VRA;

The institution and re-institution of discriminatory voting policies with impunity by recalcitrant and hostile elected officials;

The lack of notification to the public of voting policy changes that could have a discriminatory effect, which is especially significant considering most of these actions occur in small towns where constant oversight would be difficult;

The inability of the public to participate in reviewing practices before they take effect;

The elimination of the preclearance process’ deterrent effect;

An unsustainable status quo where civil rights organizations are attempting to fill the gaps created by the Shelby County decision at huge expense; and

The first redistricting cycle in decades without the full protections of the Voting Rights Act.

The record accumulated during the 116th Congress clearly established that voter dis-

crimination persists and continues to evolve more than five decades after the passing of the VRA. The Supreme Court’s decision in Shelby County has effectively permitted these laws to flourish across the states unimpeded. The evidence highlights the need for the Voting Rights Act’s preclearance regime—both in areas where voting discrimination has been substantial and persistent and based on particular voting practices that are likely to result in unconstitutional discrimination—and to update and clarify other provisions of the VRA.

During the 117th Congress, the Constitution Subcommittee built upon the record from the previous Congress, holding six additional hearings during which witnesses again presented documented evidence of widespread discrimination in the voting process. As one witness described at a hearing held in May 2021, these “direct burdens on the right to vote” include discriminatory voter purges; significantly longer wait times at the polls for minority voters as compared to white voters, disparities “that discriminatory state and local practices are at least partially responsible for”; new strict voter ID laws; restrictions on voter registration such as “exact match” laws “mandating that voters’ names on registration records must perfectly match their names on approved forms of identification”; cutbacks to early voting; and new laws restricting access to mail in voting and absentee ballots.

The record compiled over the past two Congresses indicates that states and political subdivisions have intensified their efforts to suppress minority voters through the enactment of facially neutral yet discriminatory voting practices and procedures in the eight years since the Supreme Court’s Shelby County decision. As discussed in greater detail below, President Trump and his allies’ campaign to spread the falsehood that his loss in the 2020 presidential election was due to widespread fraud has further catalyzed state and local efforts to enact discriminatory changes to voting laws under the guise of “election integrity protections.”

B. Changes to State Voting Laws Since the 2020 Election

Particularly salient to demonstrating the current need to revitalize the VRA is the renewed effort by many states to enact additional voting restrictions following former President Trump’s efforts to discredit the 2020 election results by publicly promoting baseless claims that the vote was marred by fraud and irregularities. As previously noted, even before the 2020 election, states formerly subject to the VRA’s preclearance requirement enacted a series of new voting restrictions in the wake of the Supreme Court’s decision in Shelby County. Taking cues from the baseless allegations promoted by President Trump and his allies, several state legislatures have proposed or enacted restrictive voting laws in the name of protecting so-called “election integrity protection”, including in states previously subject to the VRA’s preclearance regime.

According to a July 22, 2021 Brennan Center for Justice report, as of July 14, 18 states have enacted 30 laws that restrict the right to vote. The Brennan Center report also observes that these restrictive voting laws target mail in and absentee voting, “make faulty voter purges more likely”, and impose stricter voter ID requirements. As of August 23, 2021, the non-partisan organization Voting Rights Lab was tracking 495 anti-voter bills in the states.

The recent voting law changes enacted by Georgia exemplify many of the most restrictive voting measures adopted following the 2020 election. Notably, the entire state of Georgia was subject to preclearance under

the VRA at the time of the Shelby County decision. Signed into law by Governor Brian Kemp (R-GA) on March 25, 2021, SB 202 incorporated several restrictive voting proposals into a single omnibus elections law. Several of SB 202’s provisions are designed to limit absentee voting. It requires absentee voters to provide a Georgia driver’s license or state identification card number or photocopy of another identifying document with their absentee ballot application; prohibits election officials from providing ballot applications unless requested by the voter; and reduces the time period in which a voter can apply for an absentee ballot. Instead of allowing municipalities and counties some discretion to set the hours and days for early voting as was permitted previously, SB 202 standardizes early voting periods, effectively reducing many voters’ opportunities to vote early. One particularly notorious provision of SB 202 criminalizes as a prohibited “gift” the giving food or water to those standing in line at a polling place.

There is evidence in the public domain to suggest that Georgia’s recent changes to its election laws are more about preserving partisan political advantage by burdening minority communities’ exercise of the right to vote than protecting the integrity of elections. For example, a Gwinnett County Republican official was quoted saying “I was on a Zoom call the other day and I said, ‘I’m like a dog with a bone. I will not let them end this session without changing some of these laws.’ They don’t have to change all of them, but they’ve got to change the major parts of them so that we at least have a shot at winning.”

Other states that have enacted restrictive voter laws include Florida and Arizona. On May 6, Florida’s Republican Governor, Ron DeSantis, signed into law an omnibus voter suppression bill that makes voter registration and vote by mail more difficult, changes rules for observers in ways that could disrupt election administration, and restricts the ability to give water and food to people waiting in line to vote. On May 11, Arizona’s Republican Governor, Doug Ducey, signed into law a bill to make it harder for Arizonans to vote by mail by purging voters who do not regularly vote from Arizona’s early voting list (which, before enactment of the law, had previously been known as the state’s permanent early voting list).

In July 2021, the Texas Legislature began a special session to pass a new restrictive voting omnibus measure. Texas Senate Bill 1 and House Bill 3 each would create new ID requirements for voting by mail and clamp down on new voting rules instituted by Harris County—the state’s most populous county and one of its most diverse—designed to increase voter access, including banning drive-thru voting, and new regulations for early voting hours. Senate Bill 1 passed on August 12, 2021.

STATEMENT OF WADE HENDERSON, INTERIM PRESIDENT AND CEO, THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS

U.S. HOUSE OF REPRESENTATIVES, HOUSE COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

HEARING ON “OVERSIGHT OF THE VOTING RIGHTS ACT: POTENTIAL LEGISLATIVE REFORMS”—AUGUST 16, 2021

Chairman Cohen, Ranking Member Johnson, and members of the subcommittee: Thank you for holding this important hearing today to highlight the ongoing crisis of racial discrimination in our voting system and the urgency to fulfill the promise of our democracy. My name is Wade Henderson, and I am the interim president and CEO of The Leadership Conference on Civil and Human

Rights, a coalition of more than 220 national organizations working to build an America as good as its ideals.

The Leadership Conference was founded in 1950 and has coordinated national advocacy efforts on behalf of every major civil rights law since 1957, including the Voting Rights Act of 1965 and subsequent reauthorizations. Much of our work today focuses on making sure that every voter has a voice in key decisions like pandemic relief, access to affordable health care, and policing accountability. At The Leadership Conference, we aim to ensure that every voter can cast a vote and have it counted. We are deeply grateful to this subcommittee for its work to restore the Voting Rights Act and for introducing voluminous evidence of racial discrimination into the record with integrity, deliberation, and due diligence.

In 1965, Congress passed the Voting Rights Act to outlaw racial discrimination in voting. Previously, many states barred Black voters from participating in the political system through literacy tests, poll taxes, voter intimidation, and violence. In the mid-1950s, only 25 percent of African Americans were registered to vote, and the registration rate was even lower in some states. In Mississippi, for example, fewer than 5 percent of African Americans were registered to vote. Those rates soared after Congress enacted the Voting Rights Act. By 1970, almost as many African Americans registered to vote in Alabama, Mississippi, Georgia, Louisiana, North Carolina, and South Carolina as had registered in the century before 1965. The Voting Rights Act became the nation's most effective defense against racially discriminatory voting policies.

Only 15 years ago, this body reauthorized the Voting Rights Act for the fourth time with sweeping bipartisan support. The House of Representatives reauthorized this legislation by a 390-33 vote and the Senate passed it unanimously, 98-0. Given the importance of the Voting Rights Act, Congress undertook that reauthorization with care and deliberation—holding 21 hearings, hearing from more than 90 witnesses, and compiling a record of more than 15,000 pages of evidence of continuing racial discrimination in voting.

Then, in 2013, the U.S. Supreme Court in *Shelby County v. Holder* eviscerated the most powerful provision of the Voting Rights Act: the Section 5 preclearance system. This provision applied to nine states and localities in another six states. These jurisdictions with histories of voting discrimination were required to obtain preclearance from the U.S. District Court for the District of Columbia or the U.S. Department of Justice before implementing any change in a voting practice or procedure. As discussed herein, Section 5 was incredibly successful in blocking proposed voting restrictions in certain states and localities with histories of racial discrimination. It also ensured that changes to voting rules were public, transparent, and evaluated to protect voters against discrimination based on race and language. But, in *Shelby County*, Chief Justice John Roberts, on behalf of the majority, declared that “Our country has changed.” The Court held that the formula that decided which jurisdictions were subject to preclearance was based on “decades-old data and eradicated practices.” It instructed Congress to assess “current conditions” in order to require states and political jurisdictions to preclear voting changes. Now that this assessment has been conducted, there can be no question of the persistent racial discrimination at the ballot box. Congress must act.

Despite the best efforts of The Leadership Conference and its many member organizations to protect voting rights and promote civic participation, the eight-year impact of

the *Shelby County* ruling has been devastating to our democracy. The Supreme Court's invalidation of the preclearance formula released an immediate and sustained flood of new voting restrictions in formerly covered jurisdictions. Without the Voting Rights Act's tools to fight the most blatant forms of discrimination, people of color continue to face barriers to exercising their most important civil right, including voter intimidation, disenfranchisement laws built on top of a system of mass incarceration, burdensome and costly voter ID requirements, and purges from the voter rolls. States have also cut back early voting opportunities, eliminated same-day voter registration, and shuttered polling places. The pattern is familiar: Gains in participation in voting among communities of color are met with concerted efforts to impose new barriers in the path of those voters.

Attached to this testimony are reports covering several states which document the “current conditions” surrounding voting discrimination, the same conditions required by the Supreme Court in *Shelby County* as the basis for Congress to update a coverage formula. Additional reports will be submitted into the congressional record. These reports highlight the pervasiveness and persistence of voting discrimination in its modern-day form. They demonstrate the importance of reinstating Section 5 preclearance to stop discriminatory voting changes from going into effect and thereby ensuring that voters of color can fully participate in the political process and have their voices heard.

Alabama

In reviewing the current state of voting discrimination, it is only appropriate to begin with the State of Alabama, the birthplace of the Voting Rights Act of 1965. From Selma to *Shelby County*, Alabama has served as ground zero for the struggle by Black voters to exercise the franchise. In 1982, Congress had to explicitly add a results test to Section 2 of the Voting Rights Act after the Supreme Court required proof of intent in a Section 2 case challenging the City of Mobile's at-large voting districts as a dilution of Black voting power in *City of Mobile v. Bolden*. As the report written by the NAACP Legal Defense and Educational Fund indicates, “racial discrimination in voting remains a persistent and significant problem in Alabama today.” The Southern Poverty Law Center states in its report, also attached to this testimony: “The State of Alabama has never rested in its efforts to undermine its Black citizens' right to vote.”

Since the *Shelby County* decision, Alabama is the only state in the nation where federal courts have ordered more than one jurisdiction to submit to preclearance under Section 3(c) of the Voting Rights Act. Plaintiffs in a longstanding school desegregation case, *Stout v. Jefferson County Board of Education*, challenged the hybrid system of electing school board members in Jefferson County under which four were elected at-large from a “multi-member” district and a fifth was elected from a single-member district. No Black person had ever been elected to an at-large seat. A federal court ruled that at-large districts violated Section 2 of the Voting Rights Act, finding that the state legislature created the districts “for the purpose of limiting the influence of Black voters.” It ordered that multi-member districts be divided into four single-member districts and the county to submit future voting changes for Section 3(c) preclearance through 2031.

The City of Evergreen became the first jurisdiction in the nation to be subjected to preclearance after *Shelby County*. A lawsuit by Black voters challenged Evergreen's post-

2010 Census redistricting plan for five single-member districts, which retained three districts with white majorities even though 62 percent of Evergreen's population is Black. The lawsuit also challenged the city's system for determining voter eligibility, which removed registered voters if their names did not also appear on the list of utility customers, a practice which disproportionately removed Black voters from the voter list. Evergreen failed to obtain preclearance for these changes before the *Shelby County* ruling, and a federal court issued a preliminary injunction against the redistricting plan. After *Shelby County*, the court granted the plaintiffs' motion for summary judgment on their intentional discrimination claims and ordered Evergreen to submit future voting changes relating to redistricting and voter eligibility for preclearance until December 2020.

The Alabama report reveals additional “stunning evidence” of intentional racial discrimination against Black voters by the Alabama state legislature and local jurisdictions. African-American state legislators filed a lawsuit alleging that the Republican-led legislature intentionally sought to dilute the Black vote in violation of the Voting Rights Act and the Fourteenth Amendment by redrawing the state's legislative districts to pack Black voters into majority-Black districts, thereby reducing their influence in other districts. The legislators also claimed that the redistricting plan was an unconstitutional “racial gerrymander,” where it deliberately segregated voters into districts based on their race without adequate legal justification. A three-judge district rejected the claims, and the case was appealed to the Supreme Court, which vacated the lower court ruling and remanded the case for reconsideration. The Court concluded that the fact that the legislature “expressly adopted and applied a policy of prioritizing mechanical racial targets above all other districting criteria (save one-person, one-vote) provides evidence that race motivated the drawing of particular lines in multiple districts in the State.” On remand, one of the Eleventh Circuit's most conservative judges, William Pryor, authored an opinion for the three-judge court, ruling that 12 of the majority-minority districts were unconstitutional because the legislature relied too heavily on race in drawing their boundaries.

Another glaring example of intentional discrimination by Alabama arose in a federal bribery investigation in which recordings by White Alabama legislators revealed a plot by legislators to stop a gambling referendum from appearing on the ballot because it would increase Black voter turnout. The legislators were overheard calling Black voters “Aborigines” and predicting that the referendum would lead “[e]very black, every illiterate to be ‘bussed [to the polls] on HUD financed busses.’” A district court judge presiding over the bribery trial ruled that these legislators were not credible because they tried to “increase Republican political fortunes by reducing African American voter turnout” and because “the record establishes their purposeful, racist intent.” The court concluded that the “recordings represent compelling evidence that political exclusion through racism remains a real and enduring problem” in Alabama, and that overt racism “remain[s] regrettably entrenched in the high echelons of state government.”

Finally, Alabama's efforts to enact photo ID laws, which disproportionately burden voters of color, dates back several decades. Although Alabama was required to seek preclearance before enforcing a 2011 law enacted prior to the *Shelby County* ruling, it did not. Instead, it waited until the ruling and then allowed the law to go into effect.

The photo ID law was the subject of multiple lawsuits, recounted by both the NAACP Legal Defense Fund and the Southern Poverty Law Center in their reports. A key issue in the litigation was the limited ability of Black voters to obtain photo ID. In 2015, the Alabama governor and a state agency announced the closure of 31 driver's license offices, many in majority Black counties. The U.S. Department of Transportation opened a civil rights investigation under Title VI of the Civil Rights Act of 1964 and concluded that the closures had a disparate impact on Black Alabamians in violation of the law.

Alaska

There is a well-developed record of Alaska's discrimination against the state's indigenous peoples, Alaska Natives, which continues to this day and which was outlined in a 2017 article attached to the testimony. In 1975, the Section 4(b) coverage formula was amended to address the "pervasive" problem of "voting discrimination against citizens of language minorities." Congress identified what it described as "substantial" evidence of discriminatory practices against Alaska Natives. That evidence came in four forms: (1) Alaska Natives suffered from severe and systemic educational discrimination. (2) Alaska Natives suffered from illiteracy rates rivaling and even exceeding rates of Black voters in the South. (3) The illiteracy of Alaska Natives was exacerbated by their high limited-English proficiency (LEP) rates and need for interpreters to understand even the most basic voting materials written in English. (4) Congress considered evidence of Alaska's constitutional literacy test and its impact on Alaska Native voters.

When Section 4(b) was reauthorized in 2006, Congress considered substantial evidence of the impact of past and present educational discrimination on Native voters. Court decisions found "degraded educational opportunities" for Alaska Natives, resulting in graduation rates that lagged far behind non-Natives. Alaska's continued failure to provide equal educational opportunities profoundly affected the ability of Native voters to read registration and voting materials. Congress determined that because of Alaska's discrimination, Native voters continued "to experience hardships and barriers to voting and casting ballots because of their limited abilities to speak English and high illiteracy rates . . . particularly among the elders." The sad legacy of education discrimination remains. According to the most recent census data from the 2016 language coverage determinations under Section 203, approximately one in five adult citizens of voting age in the Bethel Census Area is Limited English Proficient in the Yup'ik language.

Alaska's record of voting discrimination has exacerbated the continuing effects of its educational discrimination against Alaska Natives. While Shelby County was being litigated, Alaska was under a settlement agreement for violating the language assistance provisions in Section 203 of the Voting Rights Act and the voter assistance provisions in Section 208 of the Act. In 2009, a federal court issued a preliminary injunction in *Nick v. Bethel* finding that the State of Alaska had engaged in a wholesale failure to provide language assistance to Yup'ik-speaking voters in the Bethel Census Area. The court noted that "State officials became aware of potential problems with their language-assistance program in the spring of 2006," but their "efforts to overhaul the language assistance program did not begin in earnest until after this litigation." At that time, Alaska had been covered under Section 5 for Alaska Natives since 1975. However, state officials had taken no steps "to ensure that Yup'ik-speaking voters have the means to

fully participate in the upcoming State-run elections" in 2008, a third of a century later.

Alaska Native villages outside of the Bethel region expected that the fruits of the hard-fought victory in the *Nick* litigation would be applied to other regions of Alaska where language coverage was mandated. However, Alaska officials made a "policy decision" not to do so. The state directed its bilingual coordinator to deny language assistance to other areas. The bilingual coordinator's last day of employment was on December 31, 2012, the very day that the *Nick* agreement ended. That led Alaska Native voters and villages from three covered regions, the Dillingham and Wade Hampton Census Areas for Yup'ik and the Yukon-Koyukuk Census Area for the Athabascan language of Gwich'in, to file suit just a month after Shelby County was decided. In *Toyukak v. Treadwell*, Alaska Natives sued the state for again violating Section 203 and for intentional discrimination in violation of the U.S. Constitution because election officials deliberately chose to deny language assistance to other regions of Alaska even while the *Nick* settlement was in effect. Alaska's recalcitrance to comply with the Voting Rights Act is particularly noteworthy because it was the first Section 203 case fully litigated to a decision in 35 years.

In defending the latter claim, Alaska argued that the Fifteenth Amendment was inapplicable to Alaska Native voters. State officials argued that Alaska Natives were entitled to less voting information than English-speaking voters. The Alaska Native voters prevailed, but only after nearly two million dollars in attorneys' fees and costs, the passage of 14 months for the "expedited" litigation, and a two-week trial in federal court. The court concluded that "based upon the considerable evidence," the plaintiffs had established that Alaska's actions in the three census areas were "not designed to transmit substantially equivalent information in the applicable minority . . . languages." The *Toyukak* decision came just 14 months after Shelby County, which refutes the majority's conclusion that "things have changed dramatically" and "[b]latantly discriminatory evasions of federal decrees are rare." The norm in many areas like Alaska in a post-Shelby world is defiance and deliberate violations of federal voting rights law to suppress registration and voting by American Indians and Alaska Natives.

Florida

The combination of a large and racially diverse electorate, two different time zones, and a history of razor-thin, contested elections would be enough basis for any state to become a focal point in an examination of voting rights. Florida's place in the ongoing conversation about the need for a renewed Voting Rights Act is well-deserved. Since situating itself at the epicenter of a modern meltdown in the 2000 presidential election, the leaders who run the state's government have been on the wrong side of policy reform opportunities that would protect the right to vote. As a result, communities of color, who comprise nearly half of Florida's population in excess of 21 million voters, remain unable to enjoy the franchise by participating fully in deciding who represents them.

Since the entire nation witnessed its ballot counting meltdown during a presidential election more than two decades ago, Florida has not ceased to find its way into voting rights controversy. The Florida report prepared by the Advancement Project and submitted with this testimony outlines a series of issues that have required careful federal oversight and intervention in support of voting rights. Prior to the Shelby County decision, the state had crafted several policies

that elicited multiple inquiries and preclearance objections from the Justice Department. For instance, the department interposed objections to Florida's state legislative maps along with subsequent policies purporting to "reform" its election administration system. All of these objections demonstrated threats to voters' ability to access the ballot due to the state's inattention to the effect of language accessibility.

Since Shelby County, however, the scope of the loss of voting rights has been exceedingly apparent. Florida has moved quickly to adopt changes in its election system, and challengers now must resort to court challenges in place of the preclearance administrative review process. For example, Florida's secretary of state was enjoined by the Northern District of Florida from employing a ballot review process based on a flawed signature mismatch examination due to a lack of notice for people to cure perceived issues with their signatures. At the same time, it should be noted that certain policy decisions that had not reached disposition under the preclearance regime slipped through the cracks, like Florida's 2012 voter purge policy where the challenge was dismissed due to the Shelby County decision in *Mi Familia Voter Education Fund v. Detzner*.

Florida has sustained its habit of undermining the will of the people, even when it was expressed clearly in a public ballot measure. In 2018, more than 60 percent of Florida voters approved a constitutional mandate to restore the rights of its returning citizens. After moving slowly to even review applications for pardons and clemency before Amendment Four, state officials doubled down by severely curtailing eligibility for rights restoration. Florida Senate Bill 7066, signed into law in 2019, created a new barrier between these citizens and the franchise: a modern-day poll tax. The new rules require these citizens to resolve all fees and costs associated with their prior convictions before becoming eligible to register.

In practice, this policy is arguably worse than the classic poll tax, because Florida acknowledges that it does not keep reliable documentation to allow a person to pay outstanding costs. Further, the impact of this law shows significant racial effects in several counties, meaning that people of color will be less likely than others to pursue the restoration of their rights. While the federal challenge to the law was not successful, the fact that the state still did not understand the likely impact of its fines and fees policy makes clear the work that preclearance review would address; this provision would be more carefully researched and either revised or eliminated due to the significant limits on the franchise.

In multiple ways, Florida impeded efforts to enhance voter accessibility during the 2020 election. Amidst a global pandemic, where voters could not cast ballots in person without risking life and health, the state did precious little to provide more opportunities to vote from home. To the extent the state took affirmative steps, officials made the problems for voters worse, not better. Even though Florida has an established record of allowing citizens to vote by mail, the state limited the number of drop boxes and locations to drop off ballots, and also curtailed the period in which early voting would occur. These policies were compounded by the troubling policy of signature matching for ballots, an arbitrary methodology which placed doubts on many cast ballots. All of this occurred against the backdrop of a well-documented fiasco with delivery times in the U.S. Postal Service. The results placed unnecessary pressures on participation rates in low-income areas of the state, as well as in communities of color.

Finally, Florida adopted S.B. 90 this year, following efforts elsewhere to push back on many of the activities and third party organizations working to address the above problems with voting practices. The new law places restrictions on the ability of organizations to assist with voter registration, a bedrock activity for many groups whose mission is to enhance participation among voters of color. Additionally, the bill directs these organizations to warn citizens who register through their systems that their applications might not arrive in time, which sows doubt and uncertainty into these private efforts to expand the franchise. And focusing on election management by local officials, the bill eliminates ballot drop-offs on Sundays, which is widely used by churches in Souls to the Polls programs. It is difficult to see these changes by Florida's leadership as motivated by anything more than a hostile move against threats to their power.

Georgia

Georgia is home to history. In 2021, Black voters in Georgia turned out in record numbers, electing the state's first Black U.S. senator, Reverend Raphael Warnock. These voters were able to make their voices heard despite tremendous obstacles enacted by the state to limit Black Georgians' participation. Their ability to not just overcome, but to triumph, is yet another example of Black Georgians' achievements, including those of storied civil rights leaders like Martin Luther King Jr. and the late Congressman John Lewis. Black and Brown Georgians deserve a democracy that allows for and encourages their full participation. Sadly, the state remains relentless in its pursuit of racial discrimination in voting.

The state has a long and sordid history of relentless efforts to disenfranchise voters of color, beginning with prohibitions against Black voting enshrined in the state's first Constitution in 1777. As Fair Fight Action demonstrates in its report, "Georgia's Enduring Racial Discrimination in Voting and the Urgent Need to Modernize the Voting Rights Act," which is attached to this testimony, there is "an urgent and overwhelming need for Congress to bring the preclearance formula found in the Voting Rights Act ("VRA") of 1965 . . . into the modern era, to reinstate robust federal oversight over discriminatory voting practices, and to strengthen and protect voting rights—for all eligible voters in Georgia and nationwide."

The glaring examples of current disenfranchisement take many forms and are recounted, chapter and verse, in the Fair Fight Action report. For example, the two recent objections interposed directly against the State of Georgia arose in the five years preceding the Shelby County ruling. In both cases, the Department of Justice found that Georgia had attempted to implement new laws that would have a retrogressive and disproportionate impact on voters of color. Most recently, in 2012, Georgia submitted for preclearance an amendment to the Georgia election code that required all nonpartisan elections for members of consolidated governments to be held in conjunction with the July primary, rather than in November. The Department of Justice objected, finding the change would affect Augusta-Richmond County, in which Black voters had just become a majority. Because Black voters were less likely to vote in July, the Department determined the change depressed turnout for voters of color and further, that the state had not sustained its burden of showing a lack of discriminatory purpose or effect.

Three years earlier, in 2009, the Department of Justice lodged an objection to a version of Georgia's voter verification program. It found that the "seriously flawed"

program, which improperly removed voters from the rolls, disproportionately affected voters of color. It made this finding based on the "actual results of the state's verification process" because Georgia had violated Section 5 of the Voting Rights Act by not seeking preclearance before implementing the program.

Fair Fight Action has collected the stories of thousands of voters across the state who faced incredible barriers to voting in the 2018 general election and the 2020-21 election cycle. For example, a DeKalb County physician, one of the country's leading infectious disease specialists, was challenged at his polling location because there was a slight discrepancy with the spelling of his last name on his driver's license as compared with his registration information. A Fulton County voter was initially refused a ballot because he was classified as a non-citizen, despite presenting his U.S. passport. Voters across the state expressed frustration at the closing and moving of polling locations, including a voter from Clay County, who was forced to drive an hour to a new polling location because her old polling location down the street closed.

Voter purges have also disenfranchised eligible and properly registered voters whose only mistake was not voting recently enough, like a voter in Warner Robins who has lived at the same address for 50 years but did not vote in recent elections. In 2019, he was placed on the state's purge list impermissibly, with no notice. Georgia voters also experienced unacceptably long lines when trying to vote, such that many voters were forced to leave without voting or experienced other adverse consequences. For example, a voter from Cobb County left her home at 6:30 a.m. to vote on Election Day in 2018. The line was too long, so she left and came back on her lunch break at 2:20 p.m. She was not able to cast her ballot until 5:30 p.m., and lost two hours of pay. In the Fair Fight Action report, there are also powerful examples of how the state abdicated its responsibility to adequately train local officials and poll workers about provisional ballots, which in turn, has resulted in conflicting and incorrect information given to voters.

Despite the high standards applied to voter discrimination claims by federal courts, at least two cases have resulted in a final judgment that a practice within the State of Georgia violated the Voting Rights Act. In a 2018 ruling, a federal court found that Sumter County's redrawn school board district map, which reduced the number of single-member districts and added two new at-large districts, violated Section 2. The plaintiff claimed the new map diluted the voting strength of Black voters. The court agreed, finding that the "infringement of black voters' right to vote in Sumter County is severe." The court specifically found there was a "glaring lack of success for African American candidates running for county-wide office, both historically and recently, despite their plurality in voting-age population." And the low rate of Black turnout was attributable to the indisputable history of discrimination in Sumter County and in Georgia. A court made a similar finding in 1997 after a bench trial on claims challenging the City of LaGrange's at-large city council district plan. Noting that LaGrange and Georgia had a long history of discrimination, the court found the plan violated Section 2 of the Voting Rights Act because it deprived citizens of color of the opportunity to elect candidates of their choice.

For further proof that attacks on voting represent an escalating threat to the rights of Georgians of color, one need look no further than the state's recently enacted Sen-

ate Bill 202. Georgia's Republican-led General Assembly hastily passed S.B. 202 after a historic turnout for the 2020 election and the 2021 Senate runoff, in which record participation among Black and Brown voters led to the election of Senator Warnock, and in response to conspiracy theory-fueled, groundless allegations of voter fraud. Provisions such as the photo ID requirement, reduced minimum early voting for runoff elections, limited access to drop boxes, and prohibition of most out-of-precinct voting will disparately impact voters of color, particularly those with limited resources and time to navigate the complex requirements. Private parties have filed seven suits against Georgia's governor, the secretary of state, the State Election Board and its members, and various county election officials for declaratory and injunctive relief challenging various provisions of S.B. 202. On June 25, 2021, the Department of Justice sued the state, the secretary of state, and the State Election Board, bringing the number of pending lawsuits challenging S.B. 202 to eight.

Louisiana

Louisiana's record of racial discrimination in voting is ever present and well-documented. As the Southern Poverty Law Center demonstrates in its report attached to this testimony, Louisiana officials have consistently developed methods of denying or diluting the votes of Black Louisianans. The tactics may have changed over time, but the outcome is the same: Black voters disproportionately bear the impact and are less able to participate in the political process.

Louisiana's population is nearly one-third Black. Since Reconstruction, however, the state has not elected a Black candidate to statewide office. Louisiana lawmakers continue to reduce the power of Black communities through at-large elections, proposed annexations, incorporation, and redistricting plans. Louisiana currently unnecessarily restricts registration, purges eligible voters from the rolls, and makes registration onerous for people with felony convictions. Since Shelby County, Louisiana has also eliminated dozens of polling places, mostly in Black communities. And while the state provides early voting, it limits the number of sites, creating incredibly long lines in the most populous parishes, including those with the most Black residents. The state also banned early voting on Sundays in 2016, which is a well-known tool for increasing Black voter turnout. The state narrowly restricts access to absentee ballots, erects barriers to ensuring that votes are counted, and engages in voter intimidation. Despite myriad barriers to voting placed in their path, Louisiana voters persevere. Southern Poverty Law Center's report recounts more than 70 Louisiana voters' stories demonstrating the personal side of voter suppression.

In 2000, the Department of Justice sued Morgan City, alleging that the at-large system for electing members to the city council violated Section 2. After five private plaintiffs filed a similar action, the cases were consolidated and the parties settled. The court entered a consent judgment, finding "a reasonable factual and legal basis to conclude that under the at-large system for election of City Council in Morgan City, minority voters have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." As a condition of the settlement, the parties agreed that all future elections for the city council would proceed according to a single-member election system.

In 2002, a residents' association sued the St. Bernard Parish School Board under Section 2 to prevent it from adopting a redistricting plan that reduced the board's size

and created two at-large seats. The redistricting plan arose from Act No. 173, which required St. Bernard Parish, upon the collection of a sufficient number of petitions, to hold a referendum to transform the parish school board from a body composed of 11 members elected from single-member districts to one composed of seven members, five elected from single-member districts and two elected at-large. Parish voters approved the “5-2” plan. Under the 11-member single-district plan, it had been possible to create a majority-Black district; indeed, prior to the referendum, the school board had tentatively approved doing just that. But the 5-2 plan made a majority-Black district impossible. The court invalidated the plan, finding that it diluted the voting strength of the parish’s Black voters in violation of Section 2.

In 2007, Black residents of Jefferson Parish filed suit against the State of Louisiana, alleging that the method for electing judges on an at-large basis to the First District of the Fifth Circuit Court of Appeals diluted Black voting strength. On July 6, 2007, the Louisiana governor signed Act 261, dividing the First District into two single-member “election sections.” The court entered a consent judgement, confirming that Act 261 provided a framework for resolving the litigation. The court ordered that the action be dismissed, subject to preclearance and implementation of Act 261.

In 2021, the Department of Justice filed suit against the City of West Monroe under Section 2, challenging the at-large method of electing representatives to the West Monroe Board of Aldermen. Although Black residents comprised nearly 30 percent of the voting-age population in West Monroe, no Black candidate had ever been elected to the board. The court entered a consent judgment adopting a “mixed” election method that provided for three single-member districts and two at-large seats.

As a harbinger of what is to come, in the latest legislative session, state lawmakers passed five bills that would have further restricted voting rights, including a bill that would unnecessarily purge registered voters, a bill that would add additional identification requirements to absentee ballots, and a bill that would ban absentee ballot drop boxes. Only fierce and persistent advocacy from dedicated organizers and a veto from the governor prevented these bills from becoming law. Louisiana’s current conditions of racial discrimination in voting are unequivocal. Without federal preclearance, the promise of the Fifteenth Amendment and the Voting Rights Act to guarantee equal voting rights will slip further away.

Mississippi

Home to voting rights heroes like Fannie Lou Hamer and Medgar Evers and the site of Freedom Summer, Mississippi is notorious for its exclusion and suppression of Black voters throughout history. Mississippi enforced white supremacy through explicit legal impediments to Black voting as well as state-sanctioned murder, including more than 650 lynchings from Reconstruction through 1950—the most of any state in the country. Mississippi was the first state sued by the Department of Justice after the Voting Rights Act was passed. Between 1965 and 2006, the department objected to more than 169 proposed voting changes in Mississippi that disenfranchised voters of color, including redistricting plans, at-large election schemes, polling place changes, candidate qualification requirements, and open primary laws. The state has the highest percentage of Black residents in the country—38 percent—yet no Black candidate has been elected to statewide office since Reconstruction.

As documented in the Southern Poverty Law Center’s report, “Freedom Summer, Shelby County, & Beyond: Mississippi’s Continued Record of Racial Discrimination in Voting, the Tireless Mississippians Who Push Forward, & the Critical Need to Restore the Voting Rights Act,” the state and many of its jurisdictions have made strident and continuous efforts to prevent Black Mississippians from participating in the political process. For example, instead of paying a “poll tax” to vote, Black Mississippians are now required to incur the burdensome expense of having certain absentee ballots and applications notarized. Additionally, instead of being asked to interpret complex legal provisions under the guise of literacy tests, Black Mississippians are now subject to unevenly applied voter ID requirements.

Voting rights litigation during the last 25 years demonstrates the ongoing struggle of voters of color. In 1993, a nonprofit group sued the City of Quitman, Mississippi, arguing that the city violated Section 2 of the Voting Rights Act by electing its five aldermen from at-large districts, thus diluting the voting strength of the city’s Black voters. A federal court granted a preliminary injunction, enjoining the upcoming 1993 alderman elections. The court later entered a final judgment, concluding that the city’s system of electing its aldermen from at-large districts violated Section 2. In 1996, Black voters challenged Calhoun County’s redistricting plan. Rather than drawing a “geographically compact black majority district,” the county created a plan that divided Black residents between five districts, where the Black population ranged from 19 percent to 42 percent. A federal appellate court held that the plan “dilute[d] minority voting strength” and therefore violated Section 2 of the Voting Rights Act. In 1997, a federal court found that Chickasaw County’s redistricting plan for its justice court judge and constable elections violated Section 2 of the Voting Rights Act. The court concluded that “the lingering effect of the past history of discrimination, the racially polarized voting patterns, the substantial socio-economic differences between black and white citizens, and the lack of success of black candidates in country-wide, county district and city-wide elections in Chickasaw County causes black voters to have less opportunity than other members of the electorate in the political process and to elect candidates of their choice.”

It is harder to vote in Mississippi than in almost any other state. Mississippi ranked 47 out of 50 in the 2020 Cost of Voting Index—which considers election system features that impact voting access, including registration deadlines, availability of pre-registration and early voting, number of polling places, poll hours, and voter ID laws. It was a modest improvement from 2016 when it ranked dead last. There is no online voter registration. No automatic or same-day registration. No early voting. Mississippi has a strict photo ID law for voting in person. One can only vote absentee by qualifying for one of a narrow set of excuses. Even those who qualify to vote absentee must have their absentee ballot application and their absentee ballot notarized. During the 2020 election season, the state refused to lift these burdensome requirements even amid a global pandemic, endangering Mississippians wishing to avail themselves of their rights and make their voices heard while keeping themselves and their families safe.

In its report, the Southern Poverty Law Center documented Mississippians’ obstacles to cast their votes. On Election Day 2012, a Hinds County resident arrived at the polling location at which she had voted for years, only to be told that her name was not in the

register, and she was not able to vote. After the election, she took time off from work to go to the courthouse and ask why her name had been removed from the rolls. She was eventually informed that her name had been removed as part of a redistricting—the first time she had ever been notified of this fact. In the 2016 presidential election, a Grenada County resident and Ole Miss student attempted to vote absentee but was charged \$10 for each document she needed to get notarized, for a total of \$20. She had to spend her last \$20 on the notary and points out that this notarization requirement is “equivalent to charging a poll tax.” A Harrison County resident moved in fall 2020 and promptly re-registered to vote at her new address. On Election Day 2020, she was turned away from her nearest polling place and was told she needed to vote at another location 30 minutes away. Once there, however, she was required to vote using a provisional ballot and later received a letter indicating her ballot had not been counted. It ultimately took her three attempts to update her address before she was finally able to receive her voter card. In the 2020 election, a Hinds County resident encountered delays and overcrowding at her polling location, which was located on the corner of two roads with no sidewalks. She and other voters had to wait in line on the side of the road for about an hour, which was difficult for many disabled and elderly voters, including the voter in front of her in line, whose wheelchair broke while waiting in line due to the poor road conditions.

Mississippi officials are relentless in curtailing the right to vote for their constituents of color. Earlier this year, House Bill 586 proposed that Mississippi direct its voter registration system to identify registered voters who may not be U.S. citizens by checking other unspecified “identification databases.” Voters flagged as “potential non-citizens” would have faced an immediate challenge to their registrations. The bill “mandated a 30-day period in which flagged voters would have had to provide a birth certificate, passport, or naturalization documents to the relevant authority.” Failure to do so would result in an immediate purge from the registered voter roll. Under threat of litigation by advocates, the bill ultimately failed, but it demonstrates that many Mississippi lawmakers remain determined to make it even more difficult to vote.

North Carolina

North Carolina’s shameful history of racism in voting includes the only successful violent municipal coup d’état in our nation’s history in the Wilmington massacre of 1898; enactment of a literacy test, poll tax, and felony-based disenfranchisement; prohibitions on single-shot voting; and discriminatory multi-member districts of 1982 that led to the landmark *Thornburg v. Gingles* decision. Yet, as documented in Forward Justice’s report, “The Struggle for Voting Rights in North Carolina: 2006-2021,” North Carolina’s recent history demonstrates the effectiveness of the Voting Rights Act prior to Shelby County and the urgent need for its reinvigoration.

In the two decades before Shelby County, the Voting Rights Act was working in North Carolina. Prior to 2013, 40 out of 100 counties were covered by Section 5, primarily located in Eastern North Carolina. As the report describes, “[w]hile the impact of Section 2 litigation since 1965 cannot be underestimated, Section 5 was the critical legal protection undergirding the fragile, but notable, gains by Black voters in the state.” From 1982 to 2013, more than 49 Section 5 objection letters were issued by the Department of Justice to North Carolina and its local jurisdictions. By

2012, African Americans were “poised to act as a major electoral force.”

After Shelby County, North Carolina became “a national testing ground for modern manifestations of Jim Crow-era voter suppression strategies and epicenter for a renewed voting rights movement to prevent discrimination at the ballot box.” In just a matter of hours after Shelby County was handed down, leadership of the North Carolina General Assembly announced that because the decision had rid them of the “headache” of the Voting Rights Act’s preclearance protections, they could now move forward with the “full bill.” H.B. 589 became known as the “monster” voter suppression law—and was more restrictive than bills seen in any other state. Among other changes, the law eliminated same-day registration, pre-registration for 16- and 17-year-olds, out-of-precinct ballots, and the first week of early voting, and instituted one of the nation’s most stringent voter ID requirements.

More than three years after H.B. 589’s passage, the U.S. Court of Appeals for the Fourth Circuit invalidated the omnibus suppression legislation, holding that the State of North Carolina illegally and intentionally targeted the right to vote of African Americans “with almost surgical precision” in violation of Section 2 and the Fourteenth and Fifteenth Amendments. The Court concluded “in sum, relying on . . . racial data, the General Assembly enacted legislation restricting all—and only—practices disproportionately used by African Americans” and “that, because of race, the legislature enacted one of the largest restrictions of the franchise in modern North Carolina.”

As described in Forward Justice’s report, North Carolinians have labored for close to a decade defending against an all-out attack on voting rights. On top of the “surgical precision” of the omnibus voter suppression legislation, North Carolina’s racially discriminatory redistricting following the 2010 decennial census represents some of the most egregious gerrymandering violations in the country to dilute and suppress the power of voters of color. Two federal decisions, *Covington v. North Carolina* and *Cooper v. Harris*, held that, in drawing the state legislative districts, the state manufactured one of the “largest racial gerrymanders ever encountered by a Federal Court” and, in constructing both Congressional District 1 and 12, the General Assembly illegally used a “racial target that subordinated other districting criteria and produced boundaries amplifying divisions between blacks and whites.” These cases are among the most prominent of the state’s complex web of voting rights violations since 2013, many documented in state and federal court challenges, which dominated the past decade.

Voting rights litigation, voter outreach and education, and voter protection work over the last decade yielded a detailed body of evidence summarized in the Forward Justice report, including in the form of coordinated third-party challenges to voter eligibility, significant reductions to polling locations and hours available in formerly covered counties, and county-level efforts to change methods of elections from single-member to at-large. As North Carolina’s elections developed into a federal battleground the state also experienced continued racial appeals in campaigning, and incidents of harassment and voter intimidation by both third-party groups and partisan actors, particularly heightened in the 2020 election cycle. One shocking incident took place on the last day of early voting on October 31, 2020, when a peaceful “Souls to the Polls” march in Graham, North Carolina, organized by Black clergy, ended with those gathered,

including the elderly and children, being pepper-sprayed and prevented from completing their walk to the early voting site in Alamance County.

Without the preventative umbrella of Section 5, North Carolinians were left working overtime to seek after-the-fact remedies, and equal democracy in the state suffered. North Carolina’s General Assembly remains in legislative session today, with legislation pending that threatens the right to vote. Following the census data release, the 2021 redistricting process is officially underway. The state produced remarkable leaders in the modern struggle for voting rights, including elders Mother Rosa Eaton and Mother Grace Hardison, who represent the best of America, as they fought under the banner of the Forward Together Moral Mondays Movement to realize the full promise of our democracy. But, as Rev. Dr. William Barber, II, a leading architect of that movement described, “these battles should never have occurred at all.” Without urgent congressional action, North Carolinians are bracing for another decade of struggle for the equal ballot, recognizing that the state’s past is a harbinger of the scope and scale of voter suppression to come.

South Carolina

South Carolina, where Black residents represent more than one quarter of the state’s population, has a long and deep history of racial discrimination in voting. It was the first state to challenge the constitutionality of the Voting Rights Act, in *South Carolina v. Katzenbach*, almost immediately after its passage in 1965. As the South Carolina report by veteran voting rights lawyer Mark Posner makes clear, that legacy of discrimination continues today, both in how the state runs elections and in structural election practices. The state has one of the most restrictive voter registration deadlines in the country; one of the most restrictive systems regarding the opportunity for voters to cast their ballot ahead of Election Day, either by mail or in person; and one of the worst recent records for wait times at the polls.

While some advances have been made in safeguarding the freedom to vote, particularly for Black Americans, they have largely been the result of Section 5 objections and litigation. Between 1996 and the Shelby County ruling, the Department of Justice issued 14 objections to voting changes which jurisdictions, including the state itself, were seeking to implement. The glaring example of the challenge to the state’s restrictive photo ID law is a case in point. It illustrates the power and the efficacy of the Voting Rights Act to block discriminatory voting changes and to deter jurisdictions from seeking to implement such changes.

In 2011, South Carolina adopted an exceedingly onerous photo ID law for voting in person and for in-person absentee voting. It recognized only five limited forms of ID: a South Carolina driver’s license, another form of photo ID issued by the South Carolina Department of Motor Vehicles, a voter registration card with a photograph (issued only by visiting a local board of registration office); a federal military photo ID; and a passport. Voters without ID could cast a provisional ballot by presenting a non-photo voter registration card and signing an affidavit that “the elector suffers from a reasonable impediment that prevents him from obtaining a photo ID.”

The Department of Justice blocked the new requirement from being implemented on the basis that it would disenfranchise tens of thousands of voters of color. It concluded that “[n]on-white voters were . . . disproportionately represented . . . in the group of registered voters who . . . would be rendered

ineligible to go to the polls and participate in the election.” The state filed a Section 5 declaratory judgement seeking preclearance from a three-judge court but failed to demonstrate that the limited roster of acceptable IDs would not have a discriminatory effect.

Facing a likely denial of preclearance, South Carolina reinterpreted the law to liberally construe the “reasonable impediment” exception to the photo ID requirement in an effort to neutralize the discriminatory effect. Under this new subjective test, the reasonableness of the impediment was “to be determined by the individual voter, not by a poll manager or county board.” Based on this interpretation, the district court precleared the revised photo ID provision for elections after 2012 but denied preclearance for the 2012 general election on the ground that there was too little time to properly implement the new provision.

In a concurring opinion, U.S. Judge John Bates famously emphasized the key role Section 5 had played in South Carolina ultimately putting forth a nondiscriminatory photo ID provision: “[O]ne cannot doubt the vital function that Section 5 of the Voting Rights Act has played here . . . Congress has recognized the importance of such a deterrent effect. . . . Rather, the history of [the new law] demonstrates the continuing utility of Section 5 of the Voting Rights Act in deterring problematic, and hence encouraging nondiscriminatory, changes in state and local voting laws.”

Texas

They say that everything’s bigger in Texas. The battle for voting rights is no exception, as documented in the Texas report submitted with this testimony. Last week’s census results illustrate that Texas gained more residents than any other state since 2010, with people of color accounting for over 95 percent of this growth. Non-Hispanic White Texans now make up just 39.8 percent of the state’s population—down from 45 percent in 2010. Meanwhile, the share of Hispanic Texans has grown to 39.3 percent. The state’s growth of Black and Asian populations also significantly outpaced that of the White population since 2010. These changes will no doubt affect the electorate for decades to come. Nearly half of all Texans under age 18 are Latino, and two million more will become eligible to vote in the next decade. Not surprisingly, Texas added a record number of new voters between last two presidential elections.

These dramatic demographic shifts in the electorate coincide with continuing and harmful attacks on voting rights in the state. At the end of last year, researchers examining the time and effort required to vote in different states ranked Texas as the worst for voting. The creation of—in their words—“the state with the most restrictive electoral climate” in light of unparalleled expansion and diversification of the electorate reflects the state’s past and foreshadows its future without federal oversight. Indeed, the pattern here is familiar one: Gains in minority participation in voting are met with concerted efforts to impose new barriers in the path of those voters. As Justice Kennedy observed in *LULAC v. Perry*,

“Texas has a long, well-documented history of discrimination that has touched upon the rights of African-Americans and Hispanics to register, to vote, or to participate otherwise in the electoral process. Devices such as the poll tax, an all-white primary system, and restrictive voter registration time periods are an unfortunate part of this State’s minority voting rights history. . . . [T]he ‘political, social, and economic legacy of past discrimination’ for Latinos in Texas

may well 'hinder their ability to participate effectively in the political process.'"

Tory Gavito, a minority politics movement builder and founder of the Texas Futures Project and Way To Win, described that: "Texas is where the South meets the West. We have a legacy of slavery in the state. We have a legacy of stealing lands and killing Mexican landowners who lived here from before the state was part of the United States of America." Its shared history demonstrates how the expansion or restriction of voting rights in Texas has implications across the country. In 1944, Thurgood Marshall successfully argued in *Smith v. Allwright* that the Texas Democratic Party's policy of prohibiting Black people from voting in primary elections violated the Fourteenth and Fifteenth Amendments. Black voter registration markedly improved immediately following the Court's ruling in *Smith*, causing Marshall to recognize the case as "a giant milestone in the progress of Negro Americans toward full citizenship." Though the white primary was struck down, several features of vote denial and abridgement in Texas remain: redistricting, the imposition of additional candidate qualifications, new at-large voting arrangements, photo ID laws, onerous voter registration procedures, voter roll purges, relocation, closures and overcrowded polling sites, and hurdles related to mail-in voting.

The wave of new voters of color in Texas have been met with the "most restrictive pre-registration law in the country." In particular, Texas has an in-person voter registration deadline 30 days prior to Election Day and prohibits online voter registration. Voters must print their registration and bring it to the county voter registrar. Texas also does not offer simultaneous registration for the 1.5 million Texans who renew or update their driver's licenses online. In contrast, other states permit an automatic voter registration process, same-day registration during early voting, and online registration options.

These same voters may need to journey to polling places that are distant from minority neighborhoods. A report by The Leadership Conference Education Fund recently noted that Texas "stands out for the volume, scale, and breadth of its polling place closures since Shelby County." This study shows that Texas has closed more polling places since Shelby County than any other state. The 750 polls closed constituted approximately 50 percent of the state's total polling places, and 590 were closed before the 2016 presidential election—the first presidential election after Shelby County. Furthermore, five of the six largest county closers of polling places are in Texas. Unsurprisingly, these counties—Dallas, Harris, Brazoria, and Nueces—are all majority-minority jurisdictions with significant Latino and Black population.

Courts have previously found Texas' voting restrictions to bear racial animus and hinder the ability of minorities to effectively participate in the political process. One recent example is from Texas' photo ID law. In 2011, Texas adopted a voter ID law that courts later found to have been passed with discriminatory intent. Senate Bill 14 required voters to present one of the specified types of photo ID when voting at the polls. The Justice Department successfully blocked the implementation of the law in 2012 under its Section 5 preclearance authority. However, Texas began enforcing S.B. 14 shortly after the Shelby County decision. Although the bill's proponents asserted that the law was necessary, both the district court and Fifth Circuit held that it violated Section 2 of the Voting Rights Act by intentionally discriminating against Black and Hispanic voters

who were less likely to hold a required photo ID.

The Texas House just passed what must be regarded as a voter suppression bill, after Texas Republicans issued civil arrest warrants for 52 of their Democratic colleagues who refused to show up to legislative votes because they oppose the legislation. If enacted, the bill would create stricter vote-by-mail rules, add new requirements to the voting process, ban drive-thru and 24-hour voting, bolster access for partisan poll watchers, and curb local voting options that would make voting easier. These requirements only build on some of the most restrictive voting laws in the nation from the last election cycle. That election night, Jolt Action, a group aimed at building political momentum among Latinos in Texas, held a get together at its headquarters. Artwork of youth of color adorned the walls of the office. One painting showed children holding hands before a wall, with the caption "They tried to bury us. They didn't know we were seeds." The question remains: Will voting restrictions scorch the earth upon which these seeds seek to grow, or will we see a garden of vibrant democracy, one tended to by federal and state protections, over decades to come?

Virginia

The post-Shelby County landscape in Virginia is devastated by rollbacks of protections for the right to vote. The Virginia report prepared by Campaign Legal Center details ongoing discrimination exposed through litigation, as well as anti-voter laws, voter intimidation and disinformation campaigns, and other tactics that disproportionately burden and disenfranchise voters of color.

Very recent litigation in Virginia Beach powerfully demonstrates the toll that discrimination in voting takes on communities of color in the state. In March 2021, a federal court held that Virginia Beach's at-large system for electing city council members violates Section 2 of the Voting Rights Act because it dilutes the voting strength of Black, Latino, and Asian American voters. The state's largest city had an 11-member city council, composed of the mayor and 10 councilmembers, each elected at-large for four-year staggered terms. The city had relied upon an at-large system since 1966, but in 50 years, the city's racial composition had changed dramatically: People of color now constitute 31.6 percent of the city's population. Despite sizable communities of color, only six candidates of color have ever been elected to Virginia Beach's city council, and barring special circumstances triggered by the pendency of litigation under the Voting Rights Act, no Black candidate has ever been re-elected to serve a second term.

In enjoining the at-large system, the federal court recognized that its discriminatory effects reflect a broader culture of racial discrimination in the city and the state that continues to impact residents of color today: "[t]he Commonwealth of Virginia and the City have histories of voter discrimination as it pertains to registration, voter suppression, gerrymandering, and other forms of discrimination." The Campaign Legal Center powerfully documents the many facets of this discrimination and concludes: "The vast evidence of racial discrimination this case has uncovered alone demonstrates the need for preclearance and other means of federal oversight to protect the right of all Americans to vote."

The Campaign Legal Center's report also sets forth discriminatory barriers to in-person voting, such as the closing, consolidating, and relocating of polling places documented in The Leadership Conference Education Fund's reports in 2016 and 2019. These

changes no longer require preclearance and disproportionately impact communities of color. Because Virginia law caps the number of registered voters each precinct can serve, localities must create new precincts. But more precincts do not necessarily mean more polling locations in communities of color. Some localities opt for one polling location to serve multiple precincts, increasing the voters assigned to a single polling place. This increases poll wait times and transportation burdens to and from the polls. During the November 2020 election, Henrico County—30.9 percent of which is Black—consolidated four polling places into existing sites. Because state law allows multiple precincts to be assigned to the same polling place, the county maintained separate precincts in the same building: each had their own poll workers and entrances, heightening voter confusion.

THE TIME IS NOW TO PASS THE JOHN LEWIS VOTING RIGHTS ADVANCEMENT ACT

When President Lyndon Johnson signed the Voting Rights Act of 1965, he declared the law a triumph and said, "Today we strike away the last major shackle of . . . fierce and ancient bonds." But 56 years later, the shackles of white supremacy still restrict the full exercise of our rights and freedom to vote.

For democracy to work for all of us, it must include us all. When certain communities cannot access the ballot and when they are not represented in the ranks of power, our democracy is in peril. The coordinated, anti-democratic campaign to restrict the vote targets the heart of the nation's promise: that every voice and every eligible vote count. Congress must meet the urgency of this moment and pass the John Lewis Voting Rights Advancement Act. This bill will restore the essential portion of the Voting Rights Act that blocks discriminatory voting policies before they go into effect, putting a transparent process in place for protecting the right to vote. It will also bring down the barriers erected to silence Black, Indigenous, young, and new Americans and ensure everyone has a voice in the decisions impacting our lives.

On March 7, 1965, just a few months before President Johnson would sign the Voting Rights Act into law, then 25-year-old John Lewis led more than 600 people across the Edmund Pettus Bridge to demand equal voting rights. State troopers unleashed brutal violence against the marchers. Lewis himself was beaten and bloodied. But he never gave up the fight. For decades, the congressman implored his colleagues in Congress to realize the promise of equal opportunity for all in our democratic process. Before his death, he wrote: "Time is of the essence to preserve the integrity and promises of our democracy." Members of this body must now heed his call with all the force they can muster.

Thank you for inviting me to testify today. I am pleased to answer any questions you may have, and I look forward to working with you to ensure all of us, no matter race or place, have an equal say in our democracy.

TESTIMONY OF PEYTON MCCRARY, PROFESSORIAL LECTURER IN LAW, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL, BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND CIVIL LIBERTIES OF THE U.S. HOUSE COMMITTEE ON THE JUDICIARY

OVERSIGHT OF THE VOTING RIGHTS ACT: POTENTIAL LEGISLATIVE REFORMS—AUGUST 16, 2021

Chair Cohen, Vice Chair Raskin, Ranking Member Johnson, and distinguished Members, thank you for inviting me to testify before you today.

My name is Peyton McCrary. Although I have retired from 20 years of full-time university teaching and 26 years of government service in the U.S. Department of Justice, I still co-teach a course on voting rights law each fall at the George Washington University Law School, where adjunct faculty bear the title Professorial Lecturer in Law. My testimony today is offered in my personal capacity as a historian, not as a representative of any organization.

The focus of my testimony is evidence regarding the jurisdictions that would be covered by a new form of federal preclearance of voting changes, which I understand is being contemplated by this chamber. Representatives of the Brennan Center for Justice and the Leadership Conference Education Fund asked me some months ago to investigate the preclearance coverage formula that is being considered for inclusion in the John Lewis Voting Rights Advancement Act (VRAA). An earlier version of the VRAA passed the House of Representatives December 6, 2019, as H.R. 4 and is now under consideration in a new Congress. The VRAA is designed to restore the preclearance provisions of the 1965 Voting Rights Act by revising the coverage formula invalidated by the Supreme Court in its 2013 decision in *Shelby County v. Holder*. Preclearance refers to the process of receiving prior federal approval from the Department of Justice or the U.S. District Court for the District of Columbia before implementing any change affecting voting. My task was to identify the jurisdictions that would be subject to preclearance should the VRAA become law. This task required the use of research methods I have employed—both in my scholarly publications and in expert witness testimony—over the last four decades. For example, it calls among other things for methodology I applied in my sworn Declaration filed by the United States in *Shelby County v. Holder* in 2010.

The new formula for determining the jurisdictions that would be subject to preclearance under the VRAA would be triggered by the record of voting rights enforcement. My analysis generally focuses on the last 25 years, currently from 1996 through 2020, although the conclusions would change if the review period changed. Under some circumstances entire states would be covered; even if the entire state is not subject to preclearance, any individual political subdivision within a state could be covered if the record of voting rights violations in that subdivision meets the criteria of the VRAA.

My analysis derives from the last VRAA, which contained a coverage formula in which an entire state would be subject to preclearance if either of two patterns of violations applied: a) if 15 or more voting rights violations occurred within the state during the previous 25 years; or b) if 10 or more violations occurred in the state during the last 25 years, at least one of which was committed by the state itself, rather than by local subdivisions within the state. I also understand that even if an entire state were not subject to preclearance, any political subdivision would be covered if it had three or more violations during the previous 25 years. Relying on that understanding, my count of violations includes: a) final judgments of a voting rights violation by the federal courts; b) objections to voting changes by the Attorney General; and c) a consent decree or other settlement causing a change favorable to minority voting rights.

I understand that Congress may consider other specifics for the coverage formula. While I am not testifying as to any approach Congress should take, I note that changes to the formula could lead to different conclusions than those I have reached.

QUALIFICATIONS

I am an historian by training and taught history at the university level from 1969 until 1990. During the 1980s I served as an expert witness in numerous voting rights cases in the South. I was employed as a social science analyst by the Voting Section, Civil Rights Division, of the U.S. Department of Justice, from 1990 until my retirement in December 2016. My responsibilities in the Civil Rights Division included the planning, direction, coordination, and performance of historical research and empirical analysis for voting rights litigation, including the identification of appropriate expert witnesses to appear for the government at trial. In some instances, I was asked to provide written or courtroom testimony on behalf of the United States. Since retiring from government service, I have served as an expert in several voting rights cases brought by private plaintiffs.

I received B.A. and M.A. degrees from the University of Virginia in 1965 and 1966, respectively, and obtained my Ph.D. from Princeton University in 1972. My primary training was in the history of the United States, with a specialization in the history of the South during the 19th and 20th centuries. For 20 years I taught courses in my specialization at the University of Minnesota, Vanderbilt University, and the University of South Alabama. In 1998–99 I took leave from the Department of Justice to serve as the Eugene Lang Professor of Social Change in the Department of Political Science at Swarthmore College. For the last fourteen years, both during government service and since retiring from the Department of Justice, I have co-taught a course on voting rights law as an adjunct professor at the George Washington University Law School.

I have published a prize-winning book, *Abraham Lincoln and Reconstruction: The Louisiana Experiment* (Princeton, N.J., Princeton University Press, 1978), six law review articles, seven articles in refereed journals, and seven chapters in refereed books. Over the last three and a half decades my published work has focused on the history of discriminatory election laws in the South, evidence concerning discriminatory intent or racially polarized voting presented in the context of voting rights litigation, and the impact of the Voting Rights Act in the South. One of these studies was made part of the record before Congress regarding the adoption of the 2006 Voting Rights Reauthorization Act. I continued to publish scholarly work in my areas of expertise while employed by the Department of Justice and expect to continue my scholarly writing now that I have retired from government service. A detailed record of my professional qualifications is set forth in the attached curriculum vitae (Attachment 1), which I prepared and know to be accurate.

Although I write about the history of voting rights law in my scholarly publications and teach in a law school, I am not an attorney. However, the findings reflected in court opinions often provide valuable evidence for investigations by experts. I routinely utilize the factual evidence provided by court decisions in my scholarly writing. As I observed in a recent journal article: “The factual evidence presented in court proceedings—in voting rights cases key evidence often comes in through expert witness testimony by political scientists or historians—is an invaluable resource for historical and social science research.”

THE METHODOLOGY I HAVE EMPLOYED IN THIS INVESTIGATION

Identifying final judgments in reported cases—and Section 5 objections interposed

by the Attorney General—was my first task. In my files I already had both hard copies and electronic copies of many of the Section 2 cases from 1982 to the present, and of the voting rights cases decided under the 14th Amendment before the amendment of Section 2 in 1982. I utilized the detailed study by Professor Ellen Katz and her students at the University of Michigan Law School, which became part of the record before Congress for the 2006 Reauthorization Act (and subsequently published as a law review article). The website of the Civil Rights Division's Voting Section—where I worked for 26 years—gave ready access to the large number of final judgments and settlement documents in cases involving the United States (under Section 2, Section 4(e), Section 5, Section 11(b), and Section 203). Access to Westlaw through GW Law School facilitated identification of other reported decisions brought on behalf of private plaintiffs that I counted as violations. The Voting Section's website also included links to all the Attorney General's Section 5 objections from the 1960s through the Shelby County decision in 2013.

Identifying consent decrees and other settlements in voting rights cases was perhaps the most time-consuming part of the investigation. The library resources of GW Law School gave me access to LexisNexis Court Link, a database with a comprehensive collection of dockets from voting rights litigation. This was the same database I had used to identify settlement documents in my 2010 declaration in *Shelby County v. Holder* (cited in Note 2 above). Many Court Link dockets included links to electronic copies of consent decrees, consent orders, and other settlement documents. Where no links were available through Court Link, I had to pursue further research to locate the needed evidence of violations (for which the internet proved invaluable). Numerous publicly available reports and scholarly publications also helped document court-ordered settlements of voting rights lawsuits.

I expect to finalize a more detailed report to the Brennan Center and the Leadership Conference soon. In my testimony today, however, I will summarize my findings and attach a listing of each violation. I hope the subcommittee finds this testimony useful in considering how to proceed with the VRAA.

FINDINGS

Let me begin by focusing on the eight states that—according to my analysis—are most likely to be subject to preclearance of voting changes. Recall that under my working understanding of the coverage formula, an entire state would be subject to preclearance if either of two patterns of violations applied: a) if 15 or more voting rights violations occurred within the state during the previous 25 years; or b) if 10 or more violations occurred in the state, at least one of which was committed by the state itself, rather than by local political subdivisions within the state. I treated as a violation, based on the last VRAA: a) a final judgment that a jurisdiction has violated the 14th or 15th Amendments, violated a provision of the Voting Rights Act, or been denied preclearance by a three-judge federal district court in the District of Columbia; b) an objection to voting changes by the Attorney General; or c) a consent decree or other settlement in a lawsuit where the defendants agreed to change the challenged election practice at issue in a manner that was favorable to minority plaintiffs. The exhibits summarize the number and type of violations that in my analysis would require federal preclearance of states if the current version of the coverage formula were enacted into law. Those states are Alabama, Florida,

Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Texas. Exhibit 1 identifies the violations in each of these states that I counted.

Although I believe they are likely to be covered, there are several states that could drop out of coverage depending on how Congress drafts the bill. Alabama, Florida, North Carolina, and South Carolina are the closest to the minimum threshold, so changes that limit what counts as a violation could drop them below 10 violations. Additionally, shortening the review period would cause many states to drop out. For example, if the review period is shortened to 20 years, I calculate that only Georgia, Louisiana, and Texas would likely be covered. At 15 years, only Georgia and Texas would likely qualify. This is not because the other states are covered only by virtue of ancient violations. To the contrary, most states I list here would still have numerous violations in recent years but would not meet the high numerical threshold under a shorter time period. This high numerical threshold ensures only states with established patterns of discrimination are covered, patterns that require a sufficient review period to capture.

On the other hand, barring wholesale changes to the coverage formula or review period, I have concluded that Georgia, Louisiana, Mississippi, and Texas are highly likely to be covered.

There are also several states that I do not think will be covered—but they could be, depending on subsequent changes in the formula. Virginia could meet the threshold of 10 violations where at least one was committed by the state, for example, if multiple findings of independent violations within one case are counted as multiple violations, although I currently calculate that Virginia has only 8 violations. New York and California are each between 10–15 violations, but none were committed by the state. If either state were to commit new violations, it would likely bring the state into coverage.

As I understand the current formula, even if an entire state would not be subject to preclearance, any political subdivision of that state in which three or more violations occurred in the preceding 25 years would be covered. The relevant political subdivision under this provision is the governmental unit responsible for voter registration—in most instances a county. Five political subdivisions in non-covered states which have three or more violations—which would therefore need to preclear voting changes—are itemized in Exhibit 3. The five counties are: Los Angeles County, California; Cook County, Illinois; Westchester County, New York; Cuyahoga County, Ohio; and Northampton County, Virginia.

CONCLUSION

I hope my analysis of the proposed coverage formula is helpful to the subcommittee's current deliberations. My testimony today has focused on empirical analysis of court decisions, Section 5 objections, and consent decrees favorable to minority voters. For a moment, however, I want to emphasize the importance of the challenge Congress currently faces. When the Section 5 preclearance process was still functional—before June 2013—it was a powerful tool for protecting minority voting rights. The bill you are considering can play a key role in confronting current efforts to limit voter registration and voting by minority citizens, as well as diluting minority voting strength. Based on my 41 years of experience in voting rights litigation, I believe firmly that strengthening enforcement of the Voting Rights Act is a critical need for our democracy.

EXHIBIT 1: STATES COVERED UNDER THE PRECLEARANCE FORMULA IN H.R. 4 IF ENACTED INTO LAW

ALABAMA: 10 VIOLATIONS—1 VIOLATION BY THE STATE

Court Decisions: (2)

Allen v. City of Evergreen, Alabama, 2014 WL 12607819 (S.D. Ala. 2014).

Ala. Legislative Black Caucus v. Alabama, 231 F. Supp. 3d 1026 (M.D. Ala. 2017), State of Alabama.

Section 5 Objections: (4)

02-06-1998: Tallapoosa County (Redistricting Plan), 97-1021.

08-16-2000: Shelby County (City of Alabaster), Annexations, 2000-2230.

01-08-2007: Mobile County (MOE change for filling county commission vacancies), 2006-6792.

08-25-2009: Shelby County (City of Calera), Annexations and redistricting plan, 2008-1621.

Consent Decrees/Settlements: (4)

Dillard v. City of Greensboro, Ala., 956 F. Supp. 1576 (M.D. Ala. 1997) (consent decree).

Dillard v. Chilton County Commission, 495 F.3d 1324 (11th Cir. 2007) (consent decree).

Jones v. Jefferson Bd. Of Education, 2019 WL 7500528 (N.D. Ala. 2019) (court-approved settlement).

Ala. State Conf. NAACP v. Pleasant Grove, Ala., 2019 WL 5172371 (N.D. Ala. 2019) (consent decree).

FLORIDA: 10 VIOLATIONS—3 VIOLATIONS BY THE STATE

Court Decisions: (3)

Stovall v. City of Cocoa, Fla., 117 F.3d 1238 (11th Cir. 1997).

U.S. v. Osceola County, Fla., 475 F. Supp. 2d 1254 (M.D. Fla. 2006).

Florida v. United States, 885 F. Supp. 2d 299 (D.D.C. 2012). State of Florida.

Section 5 Objections/Settlements: (2)

08-14-1998: State of Florida. (Changes in absentee voting certificate & absentee ballot), 98-1919.

07-01-2002: State of Florida. (2002 redistricting plan for state house), 2002-2637.

Consent Decrees/Settlements: (5)

U.S. v. Orange County, FL, No. 6:02-cv-787 (M.D. Fla. 2002) (consent decree).

U.S. v. Osceola County, FL, No. 6:02-cv-738 (M.D. Fla. 2002) (consent decree).

U.S. v. School Board of Osceola County, FL, No. 6:08-cv-582 (M.D. Fla. 2008) (consent decree).

U.S. v. Town of Lake Park, FL, C.A. No. 09-80507 (S.D. Fla. 2009) (consent decree).

Perez-Santiago v. Volusia County, No. 6:08-cv-1868 (M.D. Fla. 2010) (court-ordered settlement).

GEORGIA: 25 VIOLATIONS—4 VIOLATIONS BY THE STATE

Court Decisions: (4)

Cofield v. City of LaGrange, Ga., 969 F. Supp. 749 (N.D. Ga. 1997).

Common Cause v. Billups, 406 F. Supp. 2d 1326 (N.D. Ga., 2005).

Wright v. City of Albany, 306 F. Supp. 2d 1228 (M.D. Ga., 2003).

Wright v. Sumter County Bd. Of Elections, 301 F. Supp. 3d 1297 (M.D. Ga. 2018).

Section 5 Objections: (13)

03-15-1996: State of Georgia (1995 redistricting plans, state house & senate), 95-3656.

01-11-2000: Webster County (Redistricting plan, county school district), 98-1663.

03-17-2000: Wilkes County (MOE Tignall city council members), 99-2122.

10-01-2001: Turner County (MOE change, Ashburn), 94-4606.

08-09-2002: Putnam County (2001 redistricting plans, county commission & school board), 2002-2987, 2002-2988.

09-23-2002: Dougherty County (2001 Albany city council redistricting plan), 2001-1955.

10-15-2002: Marion County (2002 school district redistricting plan), 2002-2643.

09-12-2006: Randolph County (Change in voter registration & candidate eligibility), 2006-3856.

05-29-2009: State of Georgia (Voter verification program), 2008-5243.

11-30-2009: Lowndes County (2009 redistricting plan), 2009-1965.

04-13-2012: Greene County (2011 redistricting of commission & school board), 2011-4687.

08-27-2012: Long County (2012 redistricting of commission & school board), 2011-4687.

12-21-2012: State of Georgia (Change of election date), 2012-3262.

Consent Decrees/Settlements: (8)

McIntosh County NAACP v. McIntosh County, Ga., No. 2:77CV70 (S.D. Ga. 1977) (consent decree).

Stafford v. Mayor & Council of Folkston, Ga., No. 5:96CV00111 (S.D. Ga. 1997) (consent decree).

Simpson v. Douglasville, No. 1:96-cv-01174 (N.D. Ga. 1999) (consent decree).

McBride and U.S. v. Marion County, No. 4:99cv151 (M.D. Ga. 2000) (consent decree).

U.S. v. Long County, GA (S.D. Ga. 2006), No. CV206-040 (S.D. Ga. 2006) (consent decree).

Georgia State Conf. NAACP v. Fayette County, Ga., 118 F. Supp. 3d 1338 (N.D. Ga. 2015) (consent decree).

Georgia State Conf. NAACP v. Kemp, N. 2:16CV219 (N.D. Ga. 2017) (settlement agreement). State of Georgia.

Georgia State Conf. NAACP v. Hancock County, Ga., No. 5:15-CV-00414 (M.D. Ga. 2018) (consent decree).

LOUISIANA: 16—1 VIOLATION BY THE STATE

Court Decisions: (2)

St. Bernard Citizens for a Better Govt. v. St. Bernard Parish School Board, 2002 WL 2022589 (E.D. La. 2002).

Guillory v. Avoyelles Parish School Board, 2011 WL 499196 (W.D. La. Feb. 7, 2011).

Section 5 Objections: (13)

10-06-1997: St. Martin Parish (1997 redistricting, St. Martinsville council elections), 97-0879.

04-27-1999: Washington Parish (redistricting plan), 98-1475.

07-02-2002: Webster Parish (2001 Minden city council redistricting plan), 2002-1011.

10-04-2002: Pointe Coupee Parish (2002 redistricting, school district), 2002-2717.

12-31-2002: DeSoto Parish (2002 redistricting plan, school district), 2002-2926.

05-13-2003: Richland Parish (2002 redistricting plan, school district), 2002-3400.

10-06-2003: Tangipahoa Parish (2003 redistricting plan), 2002-3135.

12-12-2003: Iberville Parish (2003 redistricting plan, city of Plaquemine), 2003-1711.

06-04-2004: Evangeline Parish (2003 redistricting plan, city of Ville Platte), 2003-4549.

04-25-2005: Richland Parish (2003 redistricting, city of Delhi), 2003-3795.

08-10-2009: State of Louisiana (designating length of time when parish precinct boundaries are frozen during the preparation of the U.S. decennial census), 2008-3512.

Consent Decrees/Settlements: (1)

U.S. v. Morgan City, LA, No. CV00-1541 (W.D. La. 2000) (consent decree).

MISSISSIPPI: 18—2 VIOLATIONS BY THE STATE

Court Decisions: (7)

Teague v. Attala County, MS, 92 F.3d 283 15th Cir. 1996).

Clark v. Calhoun County, MS, 88 F.3d 1393 (5th Cir. 1996).

Gunn v. Chickasaw County, 1997 WL 1:02CV33426761 (N.D. Miss. 1997).

Citizens for Good Govt. v. Quitman, Ms., 148 F.3d 472 (5th Cir. 1998).

Houston v. Lafayette County, Ms., 20 F. Supp. 2d 996 (N.D. Miss. 1998).

U.S. v. Ike Brown, 494 F. Supp. 2d 440 (S.D. Miss. 2007).

Jamison v. Tupelo, 471 F. Supp. 2d 706 (N.D. Miss. 2007).

Section 5 Objections: (8)

09-22-1997: State of Mississippi (NVRA implementation plan), 95-0418.

06-28-1999: Pike County (McComb, changing polling place to American Legion), 97-3795.

12-11-2001: Montgomery County (Cancellation of election, Kilmichael), 2001-2130.

03-24-2010: State of Mississippi (majority vote requirement for county school boards, etc.), 2009-2022.

10-04-2011: Amite County (2011 redistricting plan for supervisor & election commission), 2011-1660.

04-30-2012: Adams County (2011 Natchez redistricting plan), 2011-5368.

12-03-2012: Hinds County (Redistricting plan, city of Clinton), 2012-3120.

Consent Decrees/Settlements: (3)

Coffee v. Calhoun City, MS., No. 300-cv-00103 (N.D. Miss. 2000) (consent decree).

Thornton v. City of Greenville, No. 4:93CV276 (N.D. Miss. 1998) (settlement agreement).

Tryman v. City of Starkville, No. 1:02-cv-111 (N.D. Miss. 2003) (consent decree).

NORTH CAROLINA: 11—4 VIOLATIONS BY THE STATE

Court Decisions: (3)

North Carolina Conf. NAACP v. McCrory, 831 F. 3d 204 (4th Cir. 2016), State of North Carolina.

Cooper v. Harris, 137 S. Ct. 1455 (2017), State of North Carolina.

Covington v. North Carolina, 138 S. Ct. 2548 (2018), State of North Carolina.

Section 5 Objections: (6)

02-13-1996: State of North Carolina prohibits state legislative & congressional districts from crossing precinct lines, absent Section 5 objections, 95-2922.

07-23-2002: Harnett County (2001 redistricting plan for school district), 2001-3769.

07-23-2002: Harnett County (2001 redistricting plan for commissioners), 2001-3768.

06-25-2007: Cumberland County (Change in MOE for Fayetteville city council), 2007-2233.

08-17-2009: Lenoir County (Change to non-partisan election, City of Kinston), 2009-0216.

04-30-2012: Pitt County (Change in MOE, county school district), 2011-2474.

Consent Decrees/Settlements (2)

Wilkins v. Washington County Commissioners, No. 2:93-cv-00012 (E.D.N.C. 1996) (consent decree).

Hall v. Jones County Bd. Of Commissioners, No. 4:17-cv-00018 (E.D.N.C. 2017) (consent decree).

SOUTH CAROLINA: 15—1 VIOLATION BY THE STATE

Court Decisions: (1)

U.S. v. Charleston County, SC, 365 F.3d 341 (4th Cir. 2004).

Section 5 Objections: (13)

03-05-1996: Cherokee County (Change in method of electing Gaffney Bd. Of Public Works), 95-2790.

04-01-1997: State of South Carolina (1997 senate redistricting plan), 97-0529.

05-20-1998: Horry County (1997 county council redistricting plan), 97-3787.

10-12-2001: Charleston & Berkeley Counties (2012 Charleston council redistricting), 2001-1578.

11-02-2001: Greenville & Spartanburg Counties (2001 redistricting for town of Greer), 2001-1777.

06-27-2002: Sumter County (2001 redistricting plan), 2001-3865.

09-03-2002: Union County (2002 redistricting plan for county school board), 2002-2379.

12-09-2002: Laurens County (Annexations & district assignment, Clinton), 2002-1512, 2002-2706.

06-16-2003: Cherokee County (Reduction in size of school board), 2002-3457.

09-16-2003: Orangeburg County (Annexations by town of North), 2002-5306.

02-26-2004: Charleston County (From non-partisan to partisan school board elections), 2003-2066.

06-25-2004: Richland & Lexington Counties (MOE change for School District No. 5), 2002-3766.

08-16-2010: Fairfield County (MOE & number of members, county school board), 2010-0970.

Consent Decrees/Settlements: (1)

U.S. v. Georgetown County School District, SC, No. 2:08-889 (D.S.C. 2008) (consent decree).

TEXAS: 34—3 VIOLATIONS BY THE STATE

Court Decisions: (5)

LULAC v. Perry, 548 U.S. 399 (2006).

Benevidez v. City of Irving, TX, 638 F. Supp. 2d 709 (N.D. Tex. 2009).

Fabela v. City of Farmers' Branch, 2012 WL 3135545 (N.D. Texas).

Benevidez v. Irving ISD, 2014 WL 4055366 (N.D. Texas).

Patino v. City of Pasadena, TX, 230 F. Supp. 3d 667 (S.D. Tex. 2017).

Section 5 Objections: (18)—3 violations by the state

01-16-1996: State of Texas (Authorizing employees to determine voter eligibility based on Citizenship information in files), 95-2017.

03-17-1997: Harris County (Annexations, town of Webster), 95-2017.

12-04-1998: Galveston County (Adding numbered posts to at-large seats, Galveston), 98-2149.

07-16-1999: Dawson County (De-annexation, city of Lamesa), 99-0270.

06-05-2000: Austin County (Adding numbered posts, Sealy ISD), 99-3828.

09-24-2001: Haskell Consolidated ISD (Cumulative voting with staggered terms), 2000-4426.

11-16-2001: State of Texas (2001 redistricting, state house), 2001-2430.

06-21-2002: Waller County (Redistricting plans, commissioners court, constable districts), 2001-2430.

08-12-2002: Brazoria County (MOE, Freeport city council), 2002-1725.

05-05-2006: North Harris Montgomery Community College District (reduction in polling place & early voting locations), 2006-2240.

03-24-2009: Gonzales County (Bi-lingual election procedures), 2008-3588.

03-12-2010: Gonzales County (Bi-lingual election procedures), 2009-3078.

06-28-2010: Runnels County (Bilingual election procedures), 2009-3672.

02-07-2012: Nueces County (Redistricting, county commissioners court), 2011-3992.

03-05-2012: Galveston County (Redistricting, county commissioners court), 2011-4317.

03-12-2012: State of Texas (Voter registration & photo id procedures, SB 14), 2011-2775.

12-21-2012: Jefferson County (Beaumont ISD, reduction in single member districts), 2012-4278.

04-08-2013: Jefferson County (Beaumont ISD, change in term of office, qualification procedures), 2013-0895.

Consent Decrees/Settlements: (11)

U.S. v. Ector County, TX, No. M005CV131 (W.D. Tex. 2005) (consent decree).

U.S. v. Brazos County, TX, No. H-06-2165 (S.D. Tex. 2006) (consent decree).

U.S. v. Hale County, TX, No. 5:06-CV-43 (N.D. Tex. 2006) (consent decree).

U.S. v. City of Earth, TX, 5:07-CV-144 (N.D. Tex. 2007) (consent decree).

U.S. v. Galveston County, TX, No. 3:07-CV-377 (S.D. Tex. 2007) (consent decree).

U.S. v. Littlefield ISD, TX, No. 5:07-cv-145 (N.D. Tex. 2007) (consent decree).

U.S. v. Post ISD, TX, No. 5:07-CV-146-C (N.D. Tex. 2007) (consent decree).

U.S. v. Seagraves ISD, TX, No. 5:07-CV-147 (N.D. Tex. 2007) (consent decree).

U.S. v. Smyer ISD, TX, No. 5:07-CV-148-C (N.D. Tex. 2007) (consent decree).

U.S. v. Waller County, TX, No. 4:08-cv-3022 (S.D. Texas 2008) (consent decree).

U.S. v. Fort Bend County, TX, No. 4:09-cv-1058 (S.D. Tex. 2009) (consent decree).

EXHIBIT 2: STATES NOT COVERED UNDER THE CURRENT PRECLEARANCE FORMULA IN HR 4

ALASKA: 2 VIOLATIONS

Consent Decrees/Settlements: (2)

Nick v. Bethel, No. 3:07-cv-00098 (D. Alaska) (consent decree).

Toyukak v. Treadwell, No. 3:13-CV-00137 (D. Alaska) (court-approved settlement).

ARKANSAS: 2 VIOLATIONS

Court Decisions: (0)

Consent Decrees/Settlements: (2)

Cox v. Donaldson, No. 5:02CV319 (E.D. Ark. 2003) (consent decree)

Townsend v. Watson, No. 1:89-cv-1111 (W.D. Ark. 2013) (consent decree).

ARIZONA: 4 VIOLATIONS

Section 5 Objections: (2)

05-20-2002: State of Arizona (2001 legislative redistricting plan), 2002-0276.

02-04-2003: Coconino County (MOE, Coconino Association for Vocations, Industry, and Technology), 2002-3844.

Consent Decrees/Settlements: (2)

U.S. v. Cochise County, AZ, No. CV 06-304 (D. Ariz. 2006) (consent decree).

Navajo Nation v. Brewer, No. CV 06-1575 (D. Ariz. 2008) (court-approved settlement).

CALIFORNIA: 12 VIOLATIONS

Court Decisions: (1)

Luna v. County of Kern, CA, 291 F. Supp. 3d 1088 (E.D. Cal. 2018).

Section 5 Objections: (1)

03-29-2002: Monterey County (MOE, Chualar Union Elementary School District), 2000-2967.

Consent Decrees/Settlements: (10)

U.S. v. San Benito County, CA, No. 5:04-cv-2056 (N.D. Cal. 2004) (consent decree).

U.S. v. Ventura County, CA, No. CV04-6443 (C.D. Cal. 2004) (consent decree).

U.S. v. City of Azusa, CA, No. CV05-5147 (C.D. Cal. 2005) (consent decree).

U.S. v. City of Paramount, CA, No. 05-05132 (C.D. Cal. 2005) (consent decree).

U.S. v. City of Rosemead, CA, No. CV05-5131 (C.D. Cal. 2005) (consent decree).

U.S. v. City of Walnut, CA, No: CV 07-2437 (C.D. Cal. 2007) (consent decree).

U.S. v. Riverside County, CA, CV 10-1059 (C.D. Cal. 2010) (consent decree).

U.S. v. Alameda County, CA, No. 311-cv-3262 (N.D. Cal. 2011) (court-approved settlement agreement).

U.S. v. San Diego County, CA, No. 04cv1273 (S.D. Cal. 2004) (consent decree).

U.S. v. Upper San Gabriel Valley Municipal Water District, No. CV 00-07903 (C.D. Cal. 2000) (consent decree).

COLORADO: 2 VIOLATIONS

Court Decisions: (2)

Sanchez v. State of Colorado, 97 F.3d 1303 (10th Cir. 1996).

Cuthair v. Montezuma-Cortez School District, 7 F. Supp. 2d 1152 (D. Colorado 1998).

HAWAII: 1

Court Decisions: (1)

Arakaki v. Hawaii, 314 F. 3d 1091 (9th Cir. 2002).

ILLINOIS: 4

Court Decisions: (3)

U.S. v. Town of Cicero, Illinois, 2000 WL 34342276 (N.D. Ill. 1996).

Barnett v. City of Chicago, 17 F. Supp. 2d 753 (N.D. Ill. 1998).

Harper v. Chicago Heights, IL, 223 F.3d 593 (7th Cir. 2000).

Consent Decrees/Settlements: (1)

U.S. v. Kane County, IL, No. 07-v-5451 (N.D. Ill. 2007) (memorandum of agreement).

MASSACHUSETTS: 5

Court Decisions: (1)

Black Political Task Force v. Galvin, 300 F. Supp. 2d 291 (D. Mass. 2004).

Consent Decrees/Settlements: (4)

U.S. v. City of Boston, No. 1:05-cv-11598 (D. Mass. 2005) (consent decree).

U.S. v. City of Springfield, MA, No. 06-30123 (D. Mass. 2006) (consent decree).

Huot v. City of Lowell, Mass., No. 1:17-cv-10895 (D. Mass. 2019) (consent decree).

City of Lawrence, No. 98cv12256 (D. Mass. 1998) (settlement agreement).

MICHIGAN: 3

Section 5 Objections: (1)

12-26-2007: Saginaw County (Buena Vista Township, closure of voter registration branch office), 2007-3837.

Consent Decrees/Settlements: (2)

U.S. v. City of Hamtramck, MI, No. 00-73541 (E.D. Mich. 2000) (consent decree).

U.S. v. City of Eastpointe, MI, No. 4:17-CV-10079 (2019) (consent decree).

MISSOURI: 1

Court Decisions: (1)

Missouri State Conf. NAACP v. Ferguson-Florissant School District, 201 F. Supp. 3d 1006 (E.D. Mo. 2016).

MONTANA: 5

Court Decisions: (1)

U.S. v. Blaine County, MT, 363 F.3d 897 (9th Cir. 2004).

Consent Decrees/Settlements: (4)

Matt v. Ronan School District, No. 99-94 (D. Mont. 2000) (settlement agreement).

U.S. v. Roosevelt County, MT, No. 00-50 (D. Mont. 2000) (consent decree).

Alden v. Rosebud County Board of Commissioners, No. 99-148 (D. Mont. 2000) (consent decree).

Blackfeet Nation v. Stapleton, No. 4:20-cv-95 (D. Mont. 2020) (consent decree).

NEBRASKA: 2

Court Decisions: (1)

Stable v. Thurston County, NE, 129 F. 3d 1015 (8th Cir. 1997).

Consent Decrees/Settlements: (1)

U.S. v. Colfax County, NE, No. 8:12-CV-84 (D. Neb. 2012) (consent decree).

NEVADA: 1

Court Decisions:

Sanchez v. Cevaskes, 214 F. Supp. 3d 961 (D. Nevada 2016).

NEW JERSEY: 2

Consent Decrees/Settlements: (2)

U.S. v. Salem County and Borough of Penns Grove, N.J., No. 1:08-cv-03276 (D.N.J. 2008) (court-approved settlement).

U.S. v. Passaic City and Passaic County, N.J., No. 99-2544 (D.N.J. 1999) (consent decree).

NEW MEXICO: 3

Consent Decrees/Settlements: (3)

U.S. v. Bernalillo County, N.M., No. CV-98-156 (D.N.M. 1998) (consent decree).

U.S. v. Cibola County, N.M. No. CIV 93 1134 (D.N.M. 2004) (court-approved settlement).

U.S. v. Sandoval County, N.M., No. 88-CV-1457 (D.N.M. 2004) (consent decree).

NEW YORK: 12

Court Decisions: (5)

Goosby v. Town of Hempstead, NY, 180 F.3d 476 (2nd Cir. 1999).

New Rochelle Voter Defense v. New Rochelle, NY, 308 F. Supp. 2d 152 (S.D.N.Y. 2003).

U.S. v. Village of Port Chester, NY, 704 F. Supp. 2d 411 (S.D.N.Y. 2010).

Pope v. County of Albany, N.Y., 94 F. Supp. 3d 302 (N.D.N.Y. 2013).

Molina v. Orange County, NY, 2013 WL 3009716 (S.D.N.Y. 2013).

Objections: (2)

11-15-1996: Temporary replacement of all nine elected board members of Community School District 12 by three appointed trustees and their permanent replacement by five appointed trustees: 96-3759.

02-04-1999: Change in method of election from single transferable vote to limited voting with four votes per voter for community school boards in Bronx, Kings, and New York Counties: 98-3193.

Consent Decrees/Settlements: (5)

U.S. v. Suffolk County, NY, No. CV 04-2698 (E.D. N.Y. 2004) (consent decree).

Arbor Hill Concerned Citizens v. Albany County, NY, 281 F. Supp. 2d 456 (N.D.N.Y. 2004) (consent decree).

U.S. v. Westchester County, NY, No. 05 CIV. 0650 (S.D.N.Y. 2005) (consent decree).

U.S. v. Orange County, NY, 12 Civ 3071 (S.D.N.Y. 2012) (consent decree).

Flores v. Town of Islip, NY, No. 2:18-cv-3549 (E.D.N.Y. 2020) (consent decree).

NORTH DAKOTA: 2

Court Decisions: (1)

Spirit Lake Tribe v. Benson County, N.D., 2010 WL 4226614 (D.N.D. 2010).

Consent Decrees/Settlements: (1)

U.S. v. Benson County, N.D., No. A2-00-30 (D.N.D. 2000) (consent decree).

OHIO: 4

Court Decisions: (1)

U.S. v. City of Euclid, Ohio, 580 F. Supp. 2d 584 (N.D. Ohio 2008).

Consent Decrees/Settlements: (3)

U.S. v. Euclid City School Board, 632 F. Supp. 2d 740 (N.D. Ohio 2009) (court-approved settlement).

U.S. v. Cuyahoga County, OH, No.1:10-cv-1940 (N.D. Ohio 2010) (court-approved settlement).

U.S. v. Lorain County, OH, No. 1:11-cv-02122 (N.D. Ohio 2011) (memorandum of agreement).

PENNSYLVANIA: 2

Court Decisions: (1)

U.S. v. Berks County, PA, 277 F. Supp. 2d 570 (E.D. Pa. 2003).

Consent Decrees/Settlements: (1)

U.S. v. City of Philadelphia, PA, No.2:06cv4592 (E.D. Pa. 2007) (settlement agreement).

SOUTH DAKOTA: 2

Court Decisions: (1)

Bone Shirt v. Hazeltine, 336 F. Supp. 2d 976 (D.S.D. 2004).

Section 5 Objections: (1)

02-11-2008: Charles Mix County (Increase in size & redistricting of county commission), 2007-6012.

TENNESSEE: 2

Court Decisions: (1)

Rural West Tenn. v. Sundquist, 29 F. Supp. 2d 448 (W.D. Tenn. 1998).

Consent Decrees/Settlements: (1)

U.S. v. Crockett County, TN, No. 1-01-1129 (W.D. Tenn. 2001).

VIRGINIA: 8—2 BY STATE

Personhuballah v. Alcorn, 155 F. Supp. 3d 552 (E.D. Va. 2016), State of Virginia.

Bethune-Hill v. Va. State Bd. Of Elections, 326 F. Supp. 3d 128 (E.D. Va. 2018), State of Virginia.

Section 5 Objections: (6)

10-27-1999: Dinwiddie County (Polling place change), 99-2229.

09-28-2001: Northampton County (MOE & redistricting, board of supervisors), 2001-1495.

04-29-2002: Pittsylvania County (Redistricting, county supervisors & school board), 2001-2026, 2501.

07-09-2002: Cumberland County (Redistricting plan, county supervisors), 2001-2374.

05-19-2003: Northampton County (2002 redistricting plan, county supervisors), 2002-5693.

10-21-2003: Northampton County (2003 redistricting plan, county supervisors), 2003-3010.

Consent Decrees/Settlements: (0)

WASHINGTON: 3

Court Decisions: (1)

Montes v. City of Yakima, 40 F. Supp. 3d 1377 (E.D. Wash. 2014).

Consent Decrees/Settlements:

U.S. v. Yakima County, WA, No. CV-04-3072 (E.D. Wash. 2004) (settlement agreement).

Glatt v. City of Pasco, WA, No. 4:16-CV-5108 (E.D. Wash.2017) (consent decree).

WISCONSIN: 1

Court Decisions:

Baldus v. Wisc. Govt. Accountability Bd., 849 F. Supp. 2d 840 (E.D. Wisc. 2012).

WYOMING: 1

Court Decisions:

Large v. Fremont County, Wy., 709 F. Supp. 2d 1176 (D. Wyo. 2010).

EXHIBIT 3: POLITICAL SUBDIVISIONS COVERED UNDER THE PRECLEARANCE FORMULA IN HR 4

CALIFORNIA:

Los Angeles County: 5 violations

U.S. v. City of Azusa, No. CV05-5147 (C.D. Cal. 2005) (consent decree).

U.S. v. City of Paramount, No. 05-05132 (C.D. Cal. 2005) (consent decree).

U.S. v. City of Rosemead, No. CV05-5131 (C.D. Cal. 2005) (consent decree).

U.S. v. City of Walnut, No. CV 07-2437 (C.D. Cal. 2007) (consent decree).

U.S. v. Upper San Gabriel Valley Municipal Water District, No. CV 00-07903 (C.D. Cal. 2000) (consent decree).

ILLINOIS:

Cook County: 3 violations

Barnett v. City of Chicago, 17 F. Supp. 2d 753 (N.D. Ill. 1998).

Harper v. Chicago Heights, 223 F.3d 593 (7th Cir. 2000).

U.S. v. Town of Cicero, 2000 WL 34342276 (N.D. Ill. 1996).

NEW YORK:

Westchester County: 3 violations

New Rochelle Voter Defense v. New Rochelle, 308 F. Supp. 2d 152 (S.D.N.Y. 2003).

U.S. v. Village of Port Chester, 704 F. Supp. 2d 411 (S.D.N.Y. 2010).

U.S. v. Westchester County, No. 05 CIV. 0650 (S.D.N.Y. 2005) (consent decree).

OHIO:

Cuyahoga County: 3 violations

U.S. v. Cuyahoga County, No. 1:10-cv-1940 (N.D. Ohio 2010) (court-approved settlement).

U.S. v. Euclid, 580 F. Supp. 2d 584 (N.D. Ohio 2008).

U.S. v. Euclid City School Board, 632 F. Supp. 2d 740 (N.D. Ohio 2009) (court-approved settlement).

VIRGINIA:

Northampton County: 3 violations

09-28-2001: Northampton County (MOE & redistricting, board of supervisors), 2001-1495.

05-19-2003: Northampton County (2002 redistricting plan, county supervisors), 2002-5693.

10-21-2003: Northampton County (2003 redistricting plan, county supervisors), 2003-3010.

WRITTEN STATEMENT OF SOPHIA LIN LAKIN,
DEPUTY DIRECTOR, VOTING RIGHTS PROJECT,
AMERICAN CIVIL LIBERTIES UNION

HEARING ON OVERSIGHT OF THE VOTING RIGHTS
ACT: POTENTIAL LEGISLATIVE REFORMS—AUGUST 16, 2021

Submitted to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the U.S. House Committee on the Judiciary, August 14, 2021

INTRODUCTION

Chairman Cohen, Ranking Member Johnson, and Members of the Committee, thank you for the opportunity to testify before you on the critical issue of legislative reforms to restore and strengthen the Voting Rights Act.

The ACLU Voting Rights Project was established in 1965—the same year that the historic Voting Rights Act (VRA) was enacted—and has litigated more than 350 cases since that time. Its mission is to build and defend an accessible, inclusive, and equitable democracy free from racial discrimination. The Voting Rights Project's recent docket has included more than 30 lawsuits last year alone to protect voters during the 2020 election; a pair of recent cases in the Supreme Court challenging the last administration's discriminatory census policies: Department of Commerce v. New York (successfully challenging an attempt to add a citizenship question to the 2020 Census), and Trump v. New York (challenging the exclusion of undocumented immigrants from the population count used to apportion the House of Representatives); challenges to voter purges and documentary proof of citizenship laws; and challenges to other new omnibus legislation restricting voting rights in states like Georgia and Montana.

In my capacity as Deputy Director of the ACLU Voting Rights Project, I assist in the planning, strategy, and supervision of the ACLU's voting rights litigation nationwide, which focuses on ensuring that all Americans have access to the franchise, and that everyone is equally represented in our political processes. I recently argued successfully before the U.S. Court of Appeals for the Seventh Circuit in *League of Women Voters of Indiana v. Sullivan*, a case that challenged an Indiana purge program that failed to follow the procedural safeguards mandated by the National Voter Registration Act. I am currently litigating or have litigated numerous cases challenging racially discriminatory laws under Section 2 of the Voting Rights Act, including *Sixth District of the African Methodist Episcopal Church v. Kemp*, a challenge to Georgia's sweeping voter suppression law enacted in the wake of the 2020 elections; *Thomas v. Andino*, a challenge to South Carolina's absentee ballot witness requirement and required "excuse" for absentee voting during the COVID-19 pandemic; *MOVE Texas v. Whitley*, a challenge to a discriminatory purge program in Texas; Missouri State Conference of the NAACP v. Ferguson-Florissant School District, a challenge to the discriminatory at-large method of electing school board members; *Frank v. Walker*, a challenge to Wisconsin's voter ID law; and North Carolina State Conference of the NAACP v. McCrory, a challenge to North Carolina's monster voter suppression law passed in the immediate aftermath of *Shelby County v. Holder*.

More than a century ago, the Supreme Court famously described the right to vote as the one right that is preservative of all others. As Chief Justice John Roberts has explained, "[t]here is no right more basic in our democracy than the right to participate in electing our political leaders." We are not truly free without self-government, which requires a vibrant participatory democracy, in which everyone is treated fairly in the process and equally represented. Unfortunately, our nation has a long and well-documented record of fencing out certain voters—Black voters and other voters of color, in particular—and today that racial discrimination in voting remains a persistent and widespread problem.

The landmark Voting Rights Act ("VRA"), one of the signature achievements of the Civil Rights Movement, has been critical in the efforts to combat this enduring blight. Passed initially in 1965, and reauthorized and amended (with bipartisan support) in 1970, 1975, 1982, 1992, and 2006, it is one of the most effective pieces of federal civil rights legislation. But eight years ago, in *Shelby County v. Holder*, the Supreme Court struck down the formula used to determine which jurisdictions were covered by a federal preclearance regime. This meant that the heart of the VRA—the requirement that jurisdictions with a long record of voter suppression submit proposed changes to election laws to federal officials before they went into effect—functionally ended. After *Shelby County*, the main protection afforded by the VRA is Section 2, which imposes a nationwide ban on the use of any "voting qualification or prerequisite to voting . . . which results in a denial of abridgment of the right of any citizen of the United States to vote on account of race or color." Section 2 provides only post-enactment relief, i.e., it authorizes challenges that can be brought only after a law has been passed or a policy implemented.

The inadequacy of Section 2 post-enactment relief as the principal means to protect against discrimination in voting cannot be overstated, and the ACLU and other civil rights organizations have discussed the need for the restoration of the prophylactic preclearance regime innumerable times. Even if not sufficient on its own, however, Section 2 remains an important and necessary tool to protect voting rights, and its continuing vitality is critical. My written testimony will focus on three issues that have substantially weakened the force of post-enactment relief as a bulwark against discrimination: the standard for obtaining preliminary injunctive relief in voting rights cases, the use of the so-called Purcell principle as an additional barrier to relief, and the Supreme Court's recent decision in *Brnovich v. Democratic National Committee*.

The Supreme Court's reasoning in *Shelby County* in dismantling preclearance was premised in part on the idea that plaintiffs could still challenge discriminatory voting laws under Section 2 and win relief, including preliminary relief, before an election occurs with a discriminatory practice in effect. Unfortunately, this premise was deeply mistaken. Section 2 cases are expensive, difficult to bring, and frequently take years to litigate to completion—to say nothing of the meritorious cases that are never brought at all due to these costs. Theoretically, plaintiffs can win preliminary relief while a case is being litigated—freezing the status quo, while the court determines whether an election practice violates federal law—but this too works better in theory. In practice, the standard for winning a preliminary injunction, which includes proving a substantial likelihood of success on the merits, poses a particularly high bar to relief in voting

rights cases, due to their complexity and fact-intensive nature. This means that elections proceed under regimes ultimately found to be discriminatory, with no way to compensate voters for that harm, and with the victors of those tainted elections enacting policy and accruing the benefits of incumbency.

Compounding the problem is the metastasization of the so-called Purcell principle. Named after a short, unsigned Supreme Court order from 2006, which reminded courts to consider the potential confusion that may ensue if court orders, especially conflicting ones, issue close to an election, this restatement of common sense has grown into an almost *per se* bar used to deny relief in voting cases. Over the past decade, federal courts have applied Purcell ever more aggressively, even when the putative concerns of voter confusion or administrative burden on elections officials that originally animated the doctrine are wholly absent, and in a way that tends to work in one direction: against voters and voting rights. Compounding the issue is the frequent lack of explanation of a court's reasoning: applications of Purcell often appear in the form of unsigned orders, leaving the parties and the voting public with little clarity. In short, the expansion of Purcell has made the already difficult task of halting a discriminatory regime before it can taint an election even harder, blocking relief even where voting rights plaintiffs are ultimately successful—and even when they have demonstrated as much early in their case.

Finally, the Supreme Court's recent decision in *Brnovich v. Democratic National Committee* will make it significantly more difficult for voters to bring successful lawsuits to block discriminatory voting laws under Section 2. Under the guise of interpreting the statute, the Supreme Court articulated five "guideposts" that will inevitably make showing a discriminatory burden more difficult for Plaintiffs, while putting a thumb on the scale for government defendants by allowing for the mere specter of voter fraud—without any evidence—to justify discriminatory practices.

Fortunately, for all three of these issues, Congress has the power to act to protect voting rights. It has the clear authority to set standards for the issuance of preliminary relief and injunctions in voting rights cases, and the clear ability to correct the misinterpretation of the VRA contained within *Brnovich*. Not only does Congress have the power to do so, it also has the responsibility. Under both the Fourteenth and Fifteenth Amendments, which promise equal protection under the law and the right to vote free of racial discrimination, respectively, Congress is expressly authorized—and given the duty—to make these guarantees real. The John Lewis Voting Rights Advancement Act ("JLVRAA"), which passed the House of Representatives in the 116th Congress, with additions to address the explosive growth of Purcell in the 2020 election cycle and repair the damage to Section 2 wrought by the recent *Brnovich* decision, would fight the serious threats to voting rights that we see today.

1. The Standard for Obtaining Preliminary Injunctive Relief

Following *Shelby County*, Section 2 of the VRA is the heart of federal protections for the right to vote. Unlike the VRA's preclearance regime, which applies before a law goes into effect, a Section 2 claim can only be brought after a law is already enacted or a policy announced. In the paradigm course of civil litigation, plaintiffs will file a lawsuit, and then after a trial on the merits, a court will impose money damages or issue

an injunction, i.e., an order to take or forebear from taking some action. Commonly in civil rights litigation, these injunctions bar a government actor from enforcing a law found to violate civil rights law or the U.S. Constitution. Thus, under Section 2 plaintiffs must go to court and litigate their claims—a process that costs hundreds of thousands, if not millions, of dollars and often takes years—before a judge will strike down the law or order the practice stopped. In the interim, the law or practice remains in effect. In the context of voting rights litigation, this means multiple elections involving hundreds of elected officials may be irrevocably tainted by taking place under a discriminatory regime.

In some circumstances, however, plaintiffs can move for a preliminary injunction, which is an order that preserves the status quo while the lawsuit plays out. But these are particularly difficult to win in voting rights cases. One prong of the standard for the issuance of a preliminary injunction is a showing of substantial likelihood of success on the merits. This standard makes sense in many contexts: before a court acts, prior to a full hearing of the evidence at trial or a settlement, it should be confident that it has a good basis to do so. But the difficulties in obtaining preliminary relief under this standard in the voting rights context have imperiled the ability to protect voters from being irrevocably harmed by discriminatory electoral regimes.

Voting rights cases are extremely complex and fact intensive, which is reflected in the significant expense in money and time required to litigate these cases successfully. And courts have required voting rights plaintiffs to make a substantial showing of this full panoply of proof in order to meet the likelihood of success on the merits standard before it will grant preliminary relief. This is incredibly difficult to do in a truncated time period, not least because voting rights cases frequently involve extensive statistical analysis of voting patterns and practices and plaintiffs have limited access to the information necessary to meet this showing. As a result, regimes that are ultimately found to be discriminatory can irrevocably taint an election even where plaintiffs do whatever they can to prevent that from happening.

My prior written testimony before this subcommittee identifies 15 Section 2 cases, brought after the Shelby County decision, where plaintiffs sought a preliminary injunction unsuccessfully—only to go on to win at trial or reach a favorable settlement. On average, those cases took 27 months to litigate to the grant of relief (to say nothing of unsuccessful appeals and disputes over attorneys' fees). In the interim, multiple elections took place, millions of voters cast ballots, and hundreds of elected officials took office, under regimes courts ultimately found were discriminatory or that were abandoned. For example, in a case the ACLU and partners brought challenging an omnibus voter suppression bill, *North Carolina NAACP v. McCrory*, despite plaintiffs moving as quickly as possible and seeking a preliminary injunction, voters in North Carolina chose 188 federal and state elected officials under election rules that would be subsequently struck down.

The deficiencies of litigation, with the difficulty of securing preliminary relief, are particularly acute in the voting rights context because voting is different than other civil rights litigation. In cases of employment or housing discrimination based on membership in a protected class, at least in theory, going through the legal process can restore that person's job or apartment, or make them whole through backpay or money damages. Elections are different: once an

election transpires under a discriminatory regime, it is impossible to compensate the victims of voting discrimination. Their voting rights have been compromised irrevocably because the election has already happened and cannot be re-run. While those voters may be able to freely vote in future elections, winners of the elections conducted under unlawful practices gain the benefits of incumbency, making it harder to dislodge them from office. Those elected officials will make policy while in office, and courts cannot (and should not) dislodge those decisions, even if the mechanism under which they took office is later found to be unconstitutional or to violate the VRA.

The JLVRAA appropriately addresses these particular challenges by creating a standard for the issuance of preliminary relief in voting rights cases. First, plaintiffs must “raise[] a serious question” as to whether the challenged practice violates the VRA or the U.S. Constitution. This standard appropriately seeks to balance the needed prophylactic measures to protect the right to vote without inviting frivolous litigation. Then, the court must find that the hardship imposed on the defendant (generally a government actor) is less than the hardship imposed on the plaintiff (the voter), giving “due weight to the fundamental right to cast an effective ballot.” This further ensures that courts are not compelled to issue injunctions at the drop of the hat: they must keep in mind, in addition to whether the claims are meritorious, whether the relief would be burdensome on the defendant.

Congress has the clear power to act here. The general standard for issuing preliminary injunctions is a judicial creation, which over time has developed from equitable principles into a four-pronged test familiar to lawyers and judges. However, the Supreme Court has made it clear—repeatedly and unequivocally—that Congress has the authority to alter the considerations for granting equitable relief, which includes the issuance of injunctions. The Court has further explicitly recognized that this reasoning covers preliminary relief, and that Congress can even make the issuance of certain injunctions automatic—an extreme measure compared to the much more modest one contained in the JLVRAA. In other words, “Congress may intervene and guide or control the exercise of the courts’ discretion”—as long as it does so clearly. This reasoning has been applied in federal court cases acknowledging—and upholding—the legislatively modified standard for the issuance of preliminary injunctions. These cases interpret federal laws such as the Petroleum Marketing Practices Act, Endangered Species Act, National Labor Relations Act, Federal Trade Commission Act, and the Securities Exchange Acts of 1933 and 1934. All of which is to say: there is a long-running history and unambiguous precedent blessing Congress’ ability to specify the conditions under which a preliminary injunction issues.

II. The Purcell Principle

The current standard for obtaining a preliminary injunction makes it difficult enough for plaintiffs to ensure that discriminatory regimes are blocked before they can taint an election. But the problem has worsened due to the expansion of the so-called “Purcell principle.” As described in more detail in my prior testimony, the Purcell principle stood at one point for the commonsense idea that courts should be cautious in issuing orders which change election rules in the period right before an election. In recent years, however, the use of Purcell to block relief has skyrocketed and the doctrine has become something much broader, bearing little resemblance to the guidance given in

the brief, unsigned order that is its namesake. The Purcell of today displaces the case-specific analysis required for injunctions and operates as an almost per se bar on granting relief in voting rights cases, in some (nebulously defined) period before an election. This has real effects: as outlined in my prior testimony, injunctions are frequently blocked by Purcell, even in cases where plaintiffs ultimately to go on—after the lengthy process of litigation—to win relief. The use of Purcell is only expanding, and left unchecked, it threatens to kneecap voting rights litigation nationwide.

First, Purcell today is invoked even when there is no risk of voter confusion, zero or minimal administrative burden, and where plaintiffs have acted quickly. An illustrative example is *Republican National Committee v. Democratic National Committee*. As the COVID-19 pandemic spread, Wisconsin saw a last-minute deluge of absentee ballot applications for primary elections held April 7, 2020, and elections officials struggled to process them quickly. Finding that the requirement for a witness signature as applied to a subset of voters and the absentee ballot receipt deadline were likely unconstitutional under the circumstances, the court preliminarily enjoined the witness requirement for those voters and extended the absentee ballot receipt deadline by six days, requiring the state to count ballots so long as they were received by April 13th (even if postmarked after Election Day). Although elections officials did not contest the injunction, private intervenors won partial stays of the injunction at the Seventh Circuit (as to the witness signature) and the Supreme Court (as to the postmark requirement), with both courts relying on Purcell. There was, however, no risk of voter confusion: voters were merely waiting to receive their ballot, and the district court’s order would merely allow it to be counted. Nor was there risk of administrative burden: instead, elections officials had a few extra days to process an unprecedented number of absentee ballot applications. Indeed, the two applications of Purcell themselves imposed additional burdens on elections officials—during the first weeks of an unprecedented, deadly pandemic—and created the chaotic, confusing dynamic that Purcell theoretically counsels against. My prior written testimony includes several other examples that, taken together, show how the Purcell principle has been used to block relief frequently in cases where the stated concerns of the Purcell decision itself—the need to avoid confusing voters and imposing burdens on election officials and the election system—are not present.

Second, the use of the Purcell principle appears to apply primarily in one direction only: to bar efforts to expand access to the ballot. Here, the cases in which Purcell does not apply can be just as revealing as the situations in which it does. For example, in Minnesota in the lead-up to the 2020 general election, voting rights plaintiffs and state officials entered into a consent decree in state court that allowed all ballots postmarked on or before Election Day, and received within seven days after, to be counted. In *Carson v. Simon*, a new set of plaintiffs sued, seeking a preliminary injunction blocking implementation of the consent decree on September 24—almost eight weeks after the decree was entered—which was denied on October 12. On appeal, the Eighth Circuit reversed, enjoining the state court order and therefore moving up the absentee ballot deadline, in an opinion issued five days before the general election. It is hard to imagine a situation where Purcell is more applicable: here, the requested order came at the eleventh hour, risked a great deal of voter confusion, and imposed serious administrative burdens as

state officials subsequently struggled to comply with the new ballot receipt deadline. Nevertheless, the court declined to apply *Purcell*. Other examples demonstrating this one-directional application are described in my prior written testimony.

Third, in some instances, too, appeals courts invoking *Purcell* to stay relief granted by a district court (and the increasing regularity of such stays) create the very voter confusion and administrative burdens that the *Purcell* principle in theory aims to avoid. For example, in *Frank v. Walker*, the district court issued a preliminary injunction against Wisconsin's voter ID law, and nearly 12,000 absentee ballots were mailed to voters without instructions on providing identification, hundreds of which were cast without the required documents. The Seventh Circuit stayed this order, without any mention of the voters who were merely following instructions given to them by the state; fortunately, the Supreme Court lifted the stay. But as elections have become increasingly litigated, and *Purcell* has become an increasingly prominent doctrine, these situations will reoccur. Most concerning, in a 2020 challenge to South Carolina's absentee ballot witness requirement, the Supreme Court stayed an injunction that had been affirmed by the en banc Fourth Circuit, with three members of the Supreme Court expressing the view that any votes that had already been cast in reliance on the injunction should not be counted. It should be beyond debate that voters who merely relied in good faith on instructions from elections officials in casting their ballots should not be disenfranchised due to *Purcell*.

Finally, all these problems are exacerbated by the fact that in *Purcell*-based orders, courts have frequently failed to explain their decisions; instead, the parties and the public are made to guess at basic parameters of the doctrine, such as how long the relevant period is, what counts as an election rule, and how to factor in voters' reliance interests. Typically, orders in federal courts follow full briefing, oral argument (as need be), and judicial research and drafting, a process which can often take months. The product of this is a reasoned opinion that assures the parties that their arguments got a fair hearing and provides guidance as to the rules of the road going forward. *Purcell* departs sharply from this practice, and in fact, the development of the principle occurred almost entirely in a series of four unsigned orders in the 2014 election. These brief orders provide little guidance to voters or litigations—and feed speculation that decisions are based on political concerns. While the exigent nature of election cases may sometimes leave courts with little time to craft a lengthy opinion, courts can always issue an order and follow up with an opinion explaining their reasoning. Instead, the lack of written opinions means there is no way to ensure the *Purcell* principle is being applied consistently—or even define what the *Purcell* principle is.

As with the preliminary injunction standard, Congress' ability to act here is clear. The manner under which injunctions issue, the concerns courts should take into consideration (and those they should not), and the way to weigh competing interests are all matters within Congress' power to define. In the context of *Purcell*, this could look like defining a specific, measurable period in which changes are disfavored, for legitimate reasons—to avoid the *Purcell* window growing ever larger and even more unmoored from its foundations. Congress could also clearly state the public's interest in ensuring free and fair access to the ballot, and how that interest should be weighed against administrative concerns. It could specify exactly what forms of voter confusion courts

should keep in mind and how to best minimize that confusion. Finally, it could provide guidance to courts reflecting the reality that sometimes, unforeseen events—whether an unprecedented pandemic or the actions of elections officials—occur and that this is no reason to abdicate their responsibility to safeguard the constitutional right to vote.

III. Brnovich v. Democratic National Committee and Potential Fixes

On July 1, 2021, the Supreme Court released its decision in *Brnovich v. Democratic National Committee*, and in doing so, weakened federal protections for voting rights even further. The case concerned two Arizona restrictions that had a disproportionate impact on Native American and other communities of color, and which the plaintiffs challenged as violating Section 2: a ban on the collection of early ballots and a rule mandating that ballots cast in person at the wrong precinct be discarded entirely, rather than counted for the offices for which that voter is eligible to vote. In the decision, reversing an en banc panel of the Ninth Circuit striking down the two requirements under Section 2, the Supreme Court set out five so-called “guideposts”—untethered to the actual text of the statute—in assessing Section 2 claims. The decision and these guideposts will make it harder to bring successful Section 2 claims.

The Court's decision in *Brnovich* undermines the purpose of Section 2 to provide a powerful tool to root out discrimination in voting—no matter how blunt or subtle—in numerous ways. But broadly speaking, the Court's decision did two things to make it harder to bring successful Section 2 claims.

First, the Court ratcheted up the bar for plaintiffs to establish a discriminatory burden on the right to vote. Section 2 calls for an inquiry based on “the totality of the circumstances,” into whether “political processes . . . are not equally open” to people of color—or, in other words, whether a practice imposes a burden on voters of color. *Brnovich* introduced into this inquiry whether the burden imposed by a challenged practice is, in a court's view, akin to the “usual burdens of voting,” finding those to be essentially per se permissible under Section 2. Absent from the analysis is a discussion of whether the so-called “usual” burdens of voting are equally burdensome to all voters, particularly to voters of different racial groups. Though the decision refers to “mere inconvenience,” the difficulty of, say, driving to a mail box is very different on a remote Native American reservation where residents do not receive postal service at their doors, and are also much less likely to have access to cars than it is for other voters. The Court also found relevant “the degree to which a voting rule departs from what was standard practice . . . in 1982.” But this ignores that the reauthorization of the VRA in 1982, just as in 1965, was motivated by a desire to change state election rules and eradicate the racially discriminatory measures that remained—not grandfather them into law. By introducing these irrelevant considerations into the Section 2 analysis, *Brnovich* will make it more difficult for plaintiffs to prove their cases.

Second, the Court also ratcheted down the bar for jurisdictions to defend restrictions on voting with a disparate impact. In particular, *Brnovich* imports into this inquiry—without any grounding in text or history—a state's asserted interest in preventing election fraud, even when wholly unsubstantiated with actual evidence, which it gratuitously referred to as “strong and entirely legitimate,” before concluding that rules justified with reference to these interests are “less likely to violate § 2.” The lower court

in *Brnovich* found the offered justification of voter fraud for the ban on ballot collection—particularly important to Native American communities, who often lack adequate transportation or regular postal service—to be tenuous, due to the utter absence of voter fraud in Arizona. On this point, the Supreme Court again disagreed, and went further: holding that states are under no obligation to provide any evidence of an actual history or risk of fraud within their borders, or to show how a challenged rule actually would prevent election fraud.

Fortunately, *Brnovich* was a decision based on a statutory interpretation, rather than a constitutional holding. This means Congress can correct the Court's misinterpretation of Section 2 and restore the VRA's full protections against discrimination in voting. We urge Congress to add such a legislative response to the JLVRAA.

At a minimum, any efforts to respond to *Brnovich* should make clear that any voting practice that interacts with historical and socioeconomic factors to result in discrimination against voters of color runs afoul of Section 2. This is the case whether or not the practice existed or was widespread in 1982, or any other year. Further, whether or not a court finds a burden to be one of the so-called “usual” burdens of voting should not factor into the analysis. A voting practice could well be a mere inconvenience for some voters, but a serious burden for others, to the point where they cannot meet it and are thus disenfranchised.

Any statutory language addressing *Brnovich* should also directly give courts guidance on how to weigh racially discriminatory burdens against state arguments that a measure is necessary to protect election integrity. Congress must establish that jurisdictions must do more than simply articulate unsubstantiated fears to justify discriminatory restrictions on voting. If a law imposes a discriminatory burden on voters of color, jurisdictions should, at a minimum, be required to submit evidence that the restriction actually advances a particular and important governmental interest. But the analysis should not end there: voters should also be allowed to prove how the challenged measure is pretextual or how there are alternative means to get at the same goal—without imposing the same racially discriminatory burden.

There are different ways Congress can do this. Congress could, for example, adopt an approach that codifies the relevant factors (e.g., the practice's interaction with historical and socioeconomic factors), and non-relevant factors (e.g., whether the practice existed in 1982). It could also adopt a burden-shifting approach modeled on the frameworks for addressing employment discrimination in Title VII of the Civil Rights Act of 1965 or housing discrimination in the Fair Housing Act, which could give guidance to courts as to what evidence a state needs to support an asserted interest, and how to weigh that interest against evidence of a discriminatory result. But Congress should act to restore Section 2 to the powerful weapon to combat discrimination that it was intended to be.

CONCLUSION

For each of these three issues—the difficulty winning preliminary relief, the aggressive expansion of *Purcell*, and the misinterpretation of Section 2 in *Brnovich*—there is a common thread: Congress has the power to act. Congress has clear authority to set the standards for the issuance of preliminary relief and has repeatedly done so in numerous federal statutes to address different contexts. The JLVRAA would make preliminary injunctions available if plaintiffs raise

“a serious question” as to the merits, which would act as a prophylactic to safeguard the right to vote, and is appropriate given the impossibility of remedying voting discrimination after the fact. Congress further has the power to define the public interest to include the public’s interest in representative government, elected by the broadest swath of eligible voters possible, and to provide guidance to federal courts on the period in which election-related injunctions can be issued. And finally, Congress has the unquestioned authority to clarify its intent and fix erroneous interpretations of its laws, such as the recent *Brnovich* decision. In fact, the current version of Section 2 was enacted by Congress in 1982 to respond directly to a Supreme Court case that similarly misgauged Congress’ meaning. The 1982 amendments to Section 2 thus provides a model for Congress to act again to ensure that voting rights are subject to robust protections consistent with this body’s intent.

These amendments to the VRA are not merely within Congress’ power—they are its responsibility. The Fourteenth and Fifteenth Amendments, which respectively guarantee the right to due process and equal protection under the law and the right to vote without discrimination based on race, expressly give Congress the power to enforce their guarantees. This is no accident: the Reconstruction Amendments were passed in the wake of a Civil War which was in part precipitated by a Supreme Court decision. The drafters of the amendments were well aware that the responsibility to protect voting rights could not be left entirely with the court system, and therefore purposely gave this duty to Congress. Although this country has made incredible progress since the enactment of those amendments, this obligation is ongoing. When other institutions tasked with protecting constitutional rights, such as courts and state governments, fail to do so, this body has the responsibility to intervene.

I thank you again for the opportunity to testify in front of this subcommittee on these issues.

TESTIMONY OF WENDY WEISER, VICE PRESIDENT FOR DEMOCRACY AT THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW

HEARING ON OVERSIGHT OF THE VOTING RIGHTS ACT: POTENTIAL LEGISLATIVE REFORMS BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES IN THE UNITED STATES HOUSE OF REPRESENTATIVES—AUGUST 16, 2021

Thank you for the opportunity to testify in support of strengthening the Voting Rights Act (“VRA”), a law that has played a critical role in safeguarding American democracy against pernicious, persistent threats of discrimination in the election system. The Brennan Center for Justice at NYU School of Law strongly supports this Committee’s efforts to restore and revitalize the VRA, through the John Lewis Voting Rights Advancement Act (“VRAA”).

The VRA is widely considered the most successful civil rights legislation in our nation’s history. Unfortunately, the Supreme Court has seriously hampered its effectiveness. First, in *Shelby County v. Holder*, the Court rendered inoperable the law’s preclearance provisions, which had stopped many discriminatory voting practices from ever going into effect in selected jurisdictions with a history of discrimination. More recently, in *Brnovich v. DNC*, the Court sharply limited voters’ ability to challenge discriminatory practices under the nationwide protections against voting discrimination in Section 2 of the law. Although these decisions have seriously wounded the VRA,

they also make clear that Congress has the power to restore and bolster the law.

The need to strengthen the VRA is especially urgent now, as a decade’s worth of efforts to restrict voting rights have reached a fever pitch. As I previously testified, states across the country are rapidly passing new laws rolling back voting access—many of them targeting voters of color. These new laws are being implemented on top of a host of other discriminatory voting practices that have been put in place or attempted in recent years. We are also headed into a redistricting cycle, following last week’s release of Census data, that is expected to be characterized by racial discrimination and severe gerrymandering targeting communities of color.

The VRAA is designed to address these current problems and meet current needs, while taking account of the concerns the Supreme Court identified with the 2006 reauthorization of the law. I submit this testimony to supplement the record of persistent race discrimination in voting that creates the need for the VRAA, and to explain how the VRAA is an appropriate, carefully tailored exercise of congressional authority to combat that discrimination.

I. New Evidence that Race Discrimination in Voting, and its Effects, Persist

Despite the progress made in the decades following the VRA’s initial enactment, race discrimination in voting is still a very real—and in some places a growing—problem. The record this Committee has amassed in recent months, including evidence submitted by the Brennan Center, shows overwhelming evidence of contemporary voting discrimination. While the evidence shows that race discrimination in voting is widespread, it also shows that it is especially powerful and persistent in certain geographic areas, including in a number of states that were previously covered by Section 5 of the VRA because of their past histories of discrimination in voting.

Our recent and forthcoming research provides even more evidence of the impact and persistence of discrimination in voting, underscoring the acute need for the VRAA.

A. Persistent Racial Turnout Gaps

A recently published analysis by the Brennan Center’s Kevin Morris and Coryn Grange demonstrates that turnout among nonwhite voters remains significantly lower than that among white voters. Even with record overall turnout in the 2020 election, there was a significant turnout gap between white and nonwhite voters. Overall, 70.9 percent of eligible white voters cast ballots in the 2020 election, compared to only 58.4 percent of nonwhite voters. In fact, as the graph below—reproduced from the Brennan Center’s published analysis—demonstrates, the turnout gap between white and nonwhite voters has gone virtually unchanged since 2014, and it has grown since its modern-era lows in 2008 and 2012. And even when the gap between Black and white voters was closing—a trend that has sadly reversed course in recent years—Latino and Asian American voters lagged far behind their white counterparts in participation. (This is true of Native American voters as well, though their numbers are too small for inclusion in the census data.)

While our research does not examine whether or the extent to which voter suppression efforts caused this gap to persist—and at some points, widen—it does demonstrate that the temporary closure of the Black-white voting gap in 2008 and 2012 was anomalous. This is particularly significant in light of the *Shelby County* Court’s reliance on evidence that this gap had supposedly closed by 2013 to question Congress’s justification for preclearance.

B. Larger Turnout Gaps in Previously Covered Jurisdictions

According to more recent census data, described in a forthcoming Brennan Center analysis by Coryn Grange, Peter Miller, and Kevin Morris, the racial turnout gaps are even starker in the states likely to be subject to preclearance under the VRAA. In recent years, white voter turnout has vastly exceeded nonwhite turnout in virtually every state previously subject to preclearance, and in some areas, the progress made in the decades leading up to *Shelby County* has all but vanished.

Our analysis finds that, after hitting historic lows immediately before *Shelby County* in 2012, the white-Black turnout gap has significantly grown in almost every state previously covered by the VRA. In South Carolina, for example, the white-Black turnout gap has grown by 21 percentage points since 2012, to 15 percent. In Texas and Virginia, the gap has grown by 13 percentage points, to 11 percent and 13 percent, respectively. In Louisiana, the gap has grown by 11 percentage points, to 7 percent. And in North Carolina, which was not covered in its entirety but had a number of covered political subdivisions, the gap has grown by 17 percentage points, to 3 percent. These are dramatic shifts in only eight years. In most of the states mentioned here, the turnout gap between Black and white voters grew from a slight gap in favor of Black voters to a significant gap in favor of white voters.

The data also indicates that the post-*Shelby County* racial turnout gaps are more than a Black and white issue. The total white-nonwhite turnout gap has grown since 2012 in five of the eight states likely to be covered under the VRAA. And the racial turnout gap is especially large for Hispanics. In Georgia and Virginia, for example, the non-Hispanic white-Hispanic turnout gap was 26 percentage points in 2020. In Texas, it was 19 percentage points.

C. Discriminatory Voting Barriers in 2020

In addition to a growing turnout gap among white and nonwhite voters, the 2020 election saw a proliferation of discriminatory voting barriers. A forthcoming report by the Brennan Center’s Will Wilder catalogs the wide range of barriers, disparate burdens, and discrimination voters of color faced during the 2020 election cycle. These included new restrictive voting laws, racially discriminatory voter roll purges, disparities in mail delivery and in mail ballot processing times that were exacerbated by the Covid-19 pandemic, long lines and closed polling places, racially-targeted voter intimidation, and targeted misinformation campaigns.

Perhaps more than in any other year in recent history, elected officials and political operatives were direct about their intentions to shrink the electorate in 2020, at times with explicit or thinly-veiled references to race. These statements of discriminatory intent are important context for the range of discriminatory results seen in 2020.

As we have previously testified, the push to disenfranchise voters of color continued after the election, as the Trump campaign and others filed frivolous lawsuits aimed at tossing out the votes of Black voters in urban centers and other voters of color. This litigation and the lies used to justify it helped spur on violent attacks on the Capitol. The same lies laid the rhetorical groundwork for a new wave of restrictive voting legislation this year unlike anything we have seen since the VRA’s enactment in 1965. Our most up-to-date research shows

that 18 states enacted 30 new laws restricting access to voting between January 1 and July 14, 2021.

D. Discriminatory Plans to Reduce Representation

The Brennan Center's recent report, "Representation for Some," authored by Yuriy Rudensky et al., offers additional evidence of the growing risk of race discrimination in voting. This study analyzes the impact of a voting change that is being pushed in a number of states—namely, the exclusion of non-citizens and children under 18 from the population base used to draw electoral districts. Using data from Texas, Georgia, and Missouri, the report finds that adopting an adult citizen redistricting base would have a substantial and disparate effect on communities of color, particular Latino communities.

While to date no state has adopted an adult citizen redistricting base, these findings are relevant to Congress's inquiry because there is an ongoing effort to adopt such a change, including in states that were previously subject to preclearance and would likely be covered under the VRAA. This change is being pursued with the express knowledge that its principal impact would be to disadvantage communities and voters of color. For example, Thomas Hofeller, a prominent conservative redistricting strategist who helped draw maps after the 2010 census in Alabama, Florida, North Carolina, and Texas that were later struck down by courts as discriminatory, indicated in a memo shared with conservative strategists that changing the apportionment base would be "advantageous to Republicans and non-Hispanic Whites." The substantial risk that states and localities will adopt a discriminatory adult citizen redistricting base further underscores the need for robust protections under the Voting Rights Act.

II. The VRAA's Preclearance Provisions Effectively Target the Problem of Voting Discrimination

The VRAA's preclearance provisions are well designed to target the persistent problem of voting discrimination in a manner consistent with constitutional requirements. The bill includes a coverage formula that will effectively remedy and deter illegal discrimination without casting the net so widely that it imposes burdens on jurisdictions where ordinary litigation is sufficient to stop discrimination. It does so by carefully targeting coverage to jurisdictions and conduct where discrimination is most prevalent, reflecting current conditions and recent historical experience, as the original formula did in 1965. It introduces a geographic coverage formula that triggers only in jurisdictions with recent histories of verifiable voting discrimination. It also establishes limited nationwide preclearance for certain practices that have been used frequently to discriminate against voters of color.

A. The VRAA's Preclearance Provisions Are Necessary and Warranted

These preclearance provisions are well justified by the extensive record before Congress.

First, the record before Congress makes clear that preclearance is, unfortunately, still necessary to root out persistent discrimination. As we have previously testified (and as the Supreme Court previously recognized), litigation is emphatically not enough to prevent discrimination where it is repeated; preclearance is necessary. Litigation is costly, slow, and often allows discriminatory rules to govern pending a decision. In some cases, like our recently completed lawsuit challenging Texas's strict voter ID law, multiple elections occur under discriminatory practices before a judicial resolution al-

ters or eliminates them. A favorable decision in such a case cannot un-suppress lost votes, reallocate spent resources, or restore confidence in citizens whose efforts to register and vote were wrongfully denied. Preclearance, by comparison, is a fast process that prevents certain discriminatory measures from taking effect in the first place. The pre-Shelby regime showed the effectiveness of cutting off discriminatory laws and practices at the pass rather than leaving citizens to pick up the burden of challenging them. The last eight years have shown the harm that can be done without the specter of preclearance deterring and blocking harmful laws. Indeed, in many jurisdictions, as soon as a discriminatory law or practice was successfully challenged, the legislature or other public officials took steps to put another voting restriction in its place. As voting barriers have proliferated, so have voting rights lawsuits, reaching unprecedented highs in recent years. Without congressional action, this trend shows no signs of abating.

Second, the record before Congress shows the importance of applying preclearance to elections at the federal, state, and local levels. Discriminatory laws and practices do not just plague federal elections. They also exist in school board, county commission, and state house elections, as the extensive testimony compiled by Professor Peyton McCrary shows. These elections have significant consequences; they can determine issues ranging from the educational resources provided to minority voters' children to whether representatives of minority communities are present at the redistricting table. Unless all eligible voters are able to participate in all elections free from discrimination, our society is not achieving the promise of equal justice for all.

Third, as discussed below, the record before Congress supports the application of a geographic coverage formula to target jurisdictions where voting discrimination is most rampant. And while I do not cover this in my testimony, I believe that the record also supports a practice-based trigger to target practices that are frequently applied to discriminate against minority voters. Requiring preclearance for certain voting practices that are known to be inherently discriminatory is an effective way to target the VRAA as efficiently as possible at the worst forms of discrimination.

B. The VRAA's Geographic Coverage Formula Is Well Designed to Target and Root Out Rampant Discrimination

While discrimination in voting is widespread overall, the record before this Committee shows that certain jurisdictions tend to perpetrate voting discrimination much more than others. It is therefore appropriate for Congress to include a geographic-based trigger for preclearance so as to focus remedial attention on the places where discrimination is persistent and pervasive.

The VRAA's geographic coverage formula is effectively designed to target places where discrimination is recent, widespread, and persistent.

i. The formula relies on the best evidence of discrimination. The formula identifies those jurisdictions where the problem of discrimination is the greatest by focusing on the best evidence for determining where there is a problem to remedy: a jurisdiction's recent violations of laws prohibiting race discrimination. Specifically, the VRAA looks to law violations reflected in court orders, DOJ objection letters, or settlements that were either entered by a court or contained an admission of liability and lead to a change in voting practices. The volume of litigation in and of itself is a probative way

to identify where persistent discrimination is taking place; where a jurisdiction is repeatedly discriminating against its citizens, one would expect those citizens to file repeated lawsuits.

But the mere filing of a lawsuit is not enough to trigger coverage under the VRAA; there must also be formal findings that a violation occurred. In other words, the bill looks to objective indicia that discrimination actually occurred. Not surprisingly, legal findings of voting discrimination are more common in jurisdictions that were previously covered under the VRAA's preclearance regime. As Professors Morgan Kousser and William Kenan testified, more than five out of every six successful voting rights lawsuits between 1957 and 2019 occurred in places that were previously covered, even though for most of that time preclearance prevented the implementation of discriminatory laws in those jurisdictions.

ii. The formula's high numeric threshold for violations over a 25-year review period identifies persistent patterns of discrimination. The VRAA sets numeric thresholds to capture only those states with an established pattern of discriminatory conduct. Specifically, as previously introduced, the bill would capture only those states with 10 violations, at least one of which was statewide, or 15 total violations, over the prior 25 years. These high numeric thresholds mean that the VRAA's geographic coverage for preclearance will apply only to those jurisdictions that continue to exhibit discrimination despite successful litigation. In other words, the preclearance coverage formula is specifically tailored to remedy race discrimination where case-by-case litigation has proven ineffective or inefficient. (While the bill's requirement of 10 separate, independent findings of discrimination is helpful to identify the states where the problem has been most difficult to root out, it also means that some states with quite a bit of discrimination will not be covered unless the discrimination continues over time. In those states, voters will have to rely on the other remedies in the VRA.)

The geographic coverage formula's 25-year review period is necessary to assess which of those jurisdictions with current records of discrimination also exhibit a persistent, longstanding pattern of discrimination justifying preclearance. This time period encompasses two redistricting cycles and a sufficient number of electoral cycles to identify patterns of discrimination. The length of the review period justifies the high numeric threshold for violations, and vice versa.

iii. The formula limits coverage to states with recent discrimination. The geographic coverage formula is also designed to ensure that only those states with a continuing, current problem of discrimination are covered. As discussed further below, the 25-year review period works in tandem with other provisions of the bill to ensure that jurisdictions will only be covered if they have committed violations recently. First, states that meet the coverage threshold are only subject to preclearance for 10 years, after which older violations will no longer be considered. Second, as also discussed below, states that do not have any violations within the past 10 years can easily bail out of preclearance, and Congress can streamline the bail-out process even further.

As a factual matter, the formula will not cover jurisdictions that only committed violations a long time ago, nor will it cover jurisdictions that only committed a small number of violations over a short period of time.

Based on Peyton McCrary's testimony submitted for this hearing, the VRAA will likely cover eight states, all of which were covered under the VRA pre-Shelby County: Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Texas. Assuming Congress also authorizes coverage of political subdivisions with at least three of their own violations, the following local jurisdictions would also be covered, only one of which was previously covered (because it was within a covered state): Los Angeles County, California, Cook County, Illinois, Westchester County, New York, Cuyahoga County, Ohio, and Northampton County, Virginia. Each of these states and political subdivisions has large minority populations. (Mr. McCrary's testimony also concludes that California, New York, and Virginia are close to coverage. Were California or New York to have one statewide violation, it would bring either state into coverage. While Virginia only has eight violations by Mr. McCrary's count, two statewide, that number could rise to 10 if Congress drafts the bill to count independent findings of violations within one case or objection letter as independent violations.)

Each of the covered states has at least one violation within the past decade, and most have multiple violations. In addition, each covered state has seen violations spread over a long time period; in no state are the violations concentrated in a time period shorter than 14 years. Each state is treated equally, and each has an equal opportunity to roll out of preclearance if it stops engaging in a pattern of discrimination.

iv. The formula appropriately targets local jurisdictions where discrimination is prevalent. The VRAA's geographic coverage formula is designed to cover states with consistent patterns of discrimination. Some have argued that subjecting political subdivisions within states to preclearance based on violations committed by the state itself and by other subdivisions is not fair. However, as I explain here, doing so is both reasonable on principle and consistent with past practice.

Local jurisdictions do not exist in isolation. They are embedded within larger communities and larger jurisdictions, including states. From a legal standpoint, as I discuss further below, political subdivisions are "mere creatures of the State"; as one court noted, "no legal distinction exists between State and local officials" for the purpose of preclearance. Our electoral system distributes election administration responsibility between local and state election officials. When a person votes, their selections for local, state, and federal offices are often recorded on the same ballot, and they are subject to the same policies and burdens when casting each of these votes. Perhaps more importantly, when a voter casts their ballot, they are participating in and affected by a political culture that does not necessarily stop at their town or county's borders. When this political culture has a demonstrated record of discrimination, it is not unreasonable to presume that all jurisdictions within it should be subject to preclearance. Indeed, state officeholders that engage in discriminatory practices are elected by people within each of the state's political subdivisions.

Past practice under the VRA demonstrates that state coverage is a reasonable way to identify local jurisdictions where discrimination is prevalent. The VRA previously subjected states and all their political subdivisions to preclearance based on statewide turnout figures and the use of tests and devices, regardless of the specific figures and practices within each subdivision. In practice, this successfully identified those jurisdictions where discrimination was most like-

ly to occur. A quick review of the Justice Department's objections to voting policies demonstrates that the vast majority of objections were to local-level policies in covered states. For example, the Department of Justice objected to at least 104 voting changes in Alabama while preclearance was in effect in that state; all but 18 of these objections were to local- and county-level policies spread across a wide variety of political subdivisions.

Peyton McCrary's analysis of the states likely to be covered under the VRAA shows that it is fair to conclude that discrimination pervades the local jurisdictions in those states as well. According to his testimony, every jurisdiction likely to be covered by the VRAA has at least one statewide violation, violations across at least five local jurisdictions in a broad geographic area, and violations distributed across the entire 25-year period. Take Georgia for example. Professor McCrary estimates that Georgia has 25 total violations over the 25-year period. These include four statewide violations and violations involving 19 different cities, counties, and school boards. In other words, the formula captures geographic areas where discrimination is widespread, persistent, and continues to the present day, regardless of the political subdivisions.

v. The VRA's bail-out provisions prevent over-inclusion. The bail-out provisions in Section 4(a) of the VRA ensure that local jurisdictions where discrimination is not prevalent will not be unfairly subject to coverage. Political subdivisions that have not engaged in discriminatory conduct for ten years can petition for relief from the preclearance process even if the state as a whole and its other subdivisions are still covered.

The VRA's bail-out process is easy and efficient. Since 1997, 50 jurisdictions across seven states have successfully bailed out of preclearance, according to the Department of Justice. All but one of these jurisdictions (the Northwest Austin Municipal Water District No. 1) did so via a consent decree with the Department of Justice, without contested litigation. Since the 1982 amendments to the VRA, every jurisdiction that requested bailout succeeded. According to election law expert Gerry Hebert, who represented the majority of jurisdictions that bailed out between the implementation of the 1982 amendments and Shelby County, the bailout process became more efficient over time as more jurisdictions used it.

Congress has an opportunity to make the bailout process even more efficient by creating an administrative bailout process that largely circumvents judicial review. We recommend that Congress create an administrative process for jurisdictions to seek bailout without having to file an action in court. Political subdivisions without recent violations could file requests directly with the Department of Justice. If the Department of Justice agrees that the jurisdiction qualifies for bailout under the VRA's criteria, the Attorney General could publish a Federal Register Notice that the jurisdiction is eligible for administrative bailout. If there are no objections within a specified time period, the jurisdiction could be bailed out automatically via a second Federal Register Notice, without any judicial action. Jurisdictions that are denied or face local opposition to bailout would still be able to use the existing bailout mechanism by filing an action in the District Court for the District of Columbia. Because the objective bailout criteria from the 1982 amendments closely mirror the preclearance criteria in the VRAA, Congress could also automatically "grandfather in" all jurisdictions that bailed out under the 1982 amendments pre-Shelby County out of

coverage, unless they commit the requisite number of new violations to subject them to future coverage.

III. The VRAA's Geographic Coverage Formula Is a Constitutional Exercise of Congress's Powers

The VRAA's geographic coverage formula, updating Section 4(b) of the VRA, is constitutional under Supreme Court precedent. As an initial matter, the Supreme Court has repeatedly held that the preclearance regime in Section 5 of the VRA is constitutional—and it remains constitutional today. The Court has upheld preclearance under the Fourteenth and Fifteenth amendments, which give Congress significant leeway to craft broad remedial legislation to protect against racial discrimination in voting. These amendments permit Congress to remedy and to deter voting rights violations by prohibiting conduct that is not itself strictly unconstitutional. Although the Court has recognized that preclearance is an extraordinary legislative approach that stretches ordinary principles of federalism, it has also affirmed that such "strong medicine" is necessary and constitutionally justified to address pervasive and persistent race discrimination in voting.

As I discuss above and as the record before Congress makes clear, such discrimination remains pervasive today, especially in the jurisdictions that would likely be covered under the VRAA. In expressing doubt about the continued need for preclearance roughly a decade ago, the Supreme Court observed that "[v]oter turnout and registration rates now approach parity," "[b]latantly discriminatory evasions of federal decrees are rare," and "minority candidates hold office at unprecedented levels." Simply put, these observations no longer hold true. Today, the registration and turnout gaps between white voters and voters of color are substantial and persistent, especially in jurisdictions likely to be covered. Indeed, the gaps between Hispanic and Non-Hispanic white voters rivals the registration and turnout gaps between Black and white voters from 1965. It is not rare to see states pile voting restriction after voting restriction, even as earlier restrictions are struck down by the courts in what amounts to judicial whack-a-mole. And while there are more minority candidates than ever before, minorities are still dramatically underrepresented relative to their population in the halls of congress, state legislatures, and state courts, with some states trending toward less, not more, minority representation. In short, the justification for preclearance remains powerful.

The VRAA's primary mode of imposing preclearance—its geographic coverage formula—is likewise constitutional. In Shelby County, the Supreme Court explained that there are constraints on when and how Congress can adopt preclearance. Most significantly, the Court said that any attempt to target states for preclearance coverage "must be justified by current needs" and the formula rationally related to the problem it is trying to address. Relying on this principle, the Shelby County Court struck down the prior geographic coverage formula, finding that it was improper for Congress to rely on obsolete practices, such as literacy tests, along with outdated information, such as 1960s- and 1970s-era voter registration rates, rather than current conditions and voting rights violations. The old coverage formula, the Court observed, bore no "no logical relation to the present day." And the record of voting discrimination before Congress, according to the Court, "played no role in shaping" the coverage formula. But even as the Court struck down the prior coverage formula, it invited Congress to craft an updated coverage formula responding to these

concerns. Under the Court's recent precedents, therefore, a formula that is justified by current needs and is sufficiently related to the problem it targets should pass constitutional muster.

The VRAA's updated coverage formula clearly meets that test. It is "rational in both practice and theory," as the Shelby County Court explained was required, and its remedies are "aimed at areas where voting discrimination has been most flagrant." The VRAA's preclearance regime draws on recent history of racial discrimination in voting. The updated formula looks to voting discrimination over the past 25 years, and it ensures that only states that have violations in the past 10 years will be covered. This 25-year time period, which covers two redistricting cycles and up to five presidential elections, is tailored to identify those jurisdictions with a persistent record of discrimination—precisely what the Court requires to justify disparate geographic coverage. A shorter period of review would not be long enough to identify a sustained pattern of misconduct and could risk subjecting to preclearance states and jurisdictions with only sporadic violations. Indeed, as discussed above, all the potentially covered jurisdictions have a steady and consistent stream of violations, showing that the formula is in fact well-tailored.

Critical features of the coverage formula, moreover, ensure that the VRAA captures only current violators, not just jurisdictions that had problems 25 years ago. Two particular features of the VRAA make that so. First, the VRAA covers jurisdictions for only ten years at a time. After ten years of coverage, jurisdictions are automatically freed from preclearance, unless their continuing violations merit renewed coverage. So, jurisdictions that improve their recent records of discrimination will systematically drop out of coverage, while jurisdictions that have increased instances of discrimination will enter it. Thus, the VRAA has an implicit sunset provision: when a jurisdiction no longer engages in a pattern of discrimination in voting, it will no longer be subject to coverage. And should the day come when voting discrimination no longer plagues our country, the VRAA will become dead letter, no longer subjecting any states or localities to preclearance. In addition to the ten-year coverage period, the VRAA's bail-out regime ensures that any jurisdiction without violations over the past decade will be able to quickly and efficiently escape preclearance. And the proposed modifications to the bail-out regime that I discuss above would further ensure that the coverage formula is laser-focused on present-day discrimination. This responsive focus on current conditions is exactly what the Court asked for in Shelby County.

The VRAA modernizes the coverage formula and, as the Shelby Court requested, uses a "narrowed scope" to reflect both current problems and progress made to date. While the states that are likely to be covered under the VRAA's updated formula were all previously covered, some states that were previously covered—Alaska, for example—will likely not be covered. And it is not surprising that the list of states with a past history of discrimination overlaps substantially with the list of states with current problems of persistent discrimination. On the other hand, the local jurisdictions that will be captured by this formula are largely jurisdictions that were not previously covered. They are all jurisdictions with large and growing minority populations. This shows that Congress has indeed updated the law to be dynamic and responsive to modern conditions. Clearly, the record before this Congress is playing a substantial "role in shaping the

statutory formula" that will be included in the VRAA.

The VRAA also tracks discrimination more directly than the coverage formula struck down in Shelby County. The VRAA's coverage formula "limit[s] its attention to the geographic areas where immediate action seem[s] necessary"—specifically, areas where there is actual "evidence of actual voting discrimination," that are "characterized by voting discrimination 'on a pervasive scale.'" To that end, the VRAA's touchstone is not registration and turnout numbers—it is actual, proven acts of discrimination. Such acts are self-evidently "relevant to voting discrimination." By linking coverage to objective findings of discrimination, the VRAA targets only those places where proven discrimination against voters of color persists. In this regard, the VRAA's coverage formula is similar to the uncontroversial bail-in provision found in Section 4 of the VRA: covering those states and localities where there are, in the words of the 1965 House Report, "pockets of discrimination."

Concerns regarding the coverage formula's potential overbreadth are misplaced. As noted above, the coverage formula effectively targets geographic areas where discrimination is prevalent, and the bail-out regime would enable any political subdivision without discrimination to escape preclearance. The prior geographic coverage formula that the Supreme Court repeatedly upheld subjected all political subdivisions to preclearance based on a statewide inquiry. In any event, the Supreme Court has made clear time and again that the benefits of state sovereignty do not extend to its political subdivisions. This is because "the law ordinarily treats municipalities as creatures of the State." On this basis, one district court held it reasonable to bring all subdivisions and a state itself into preclearance based on a pattern of violations by some of its subdivisions. In reviewing a request to bail the state of Arkansas and all its subdivisions into coverage for certain electoral processes, that court found that because "[c]ities, counties, and other local subdivisions are mere creatures of the State" that the State may "create or abolish . . . at will," "no legal distinction exists between State and local officials" for the purpose of preclearance. The court also found that because the use of the relevant voting practice was clearly a "pattern" and a "systematic and deliberate attempt to reduce black political opportunity," it was reasonable to hold all other jurisdictions in the state to the preclearance requirement. The Supreme Court has never questioned this approach to sub-state preclearance.

Although not the focus of my testimony, there are two other points relevant to the VRAA's constitutionality. First, in addition to the geographic coverage formula, the VRAA also features a practice-based preclearance regime with nationwide application. This practice-based preclearance regime singles out often discriminatory practices—such as changes in methods of election, annexations, polling place relocations, and interference with language assistance—for federal oversight. Because it has no specific geographic scope and does not impose continuing coverage, it does not implicate, much less offend, the principle of equal sovereignty articulated in the Shelby County opinion.

Second, separate and apart from the Fourteenth and Fifteenth Amendments, Congress has extremely strong powers under the Elections Clause to set the "times, places and manner" of federal elections—powers the Supreme Court has said include "authority to provide a complete code for congressional elections." Congress has invoked those pow-

ers to enact voting legislation like the National Voter Registration Act, which the Supreme Court has determined permissibly overlays a "superstructure of federal regulation atop state voter-registration systems." And just a few years ago, the Supreme Court approvingly discussed how Congress has used the Elections Clause to "enact[] a series of laws to protect the right to vote through measures such as the suspension of literacy tests and the prohibition of English-only elections." The Elections Clause, therefore, independently justifies the VRAA to the extent that it regulates federal elections. The Supreme Court's concerns in Shelby County—which were based on Court's interpretation of the Fourteenth and Fifteenth Amendments—have no bearing on the constitutionality of the VRAA as it pertains to federal elections.

IV. Congress Should Restore and Strengthen Section 2 of the VRA in the Wake of the Supreme Court's Recent Brnovich Decision

As my colleague Sean Morales-Doyle recently testified at length, we also strongly urge Congress to use this opportunity to restore Section 2 of the Voting Rights Act in the wake of the Supreme Court's recent decision in *Brnovich v. Democratic National Committee*. Section 2 is critical for fighting voting discrimination in jurisdictions not subject to preclearance (and for fighting certain forms of voting discrimination in covered jurisdictions as well). The *Brnovich* decision seriously diminished Section 2's strength, making it much less effective a tool for rooting out modern discriminatory voting laws and practices. In doing so, it undermined Congress's clear intent in 1982 to create a powerful remedy to attack electoral laws and practices that interact with the ongoing effects of discrimination to produce discriminatory results in the voting process.

There are a number of approaches to restoring Section 2 to its full strength, but they all share two basic features. First, they would codify the so-called "Senate Factors" that courts have long used to assess whether a voting law or practice results in unlawful discrimination under Section 2, and make clear that courts should consider those factors in both vote dilution (redistricting) and vote denial (vote suppression) cases. Second, they would disclaim the artificial limitations the *Brnovich* opinion placed on courts considering Section 2 claims—such as the suggestion that voting practices that were in place in 1982 should be treated as presumptively valid under Section 2, and the suggestion that unequal access to one method of voting can be excused if other methods of voting are freely available. These two fixes would ensure that Section 2 comports with both Congress's original intent in amending Section 2 in 1982 and with prior practice in federal courts. The Supreme Court was clear in *Brnovich* that its ruling was based in statutory interpretation. Congress can therefore easily correct the Court's misinterpretation and restore Section 2 to its intended strength.

While the *Brnovich* decision applies only to "vote denial" claims, it is important that any statutory fix address "vote dilution" or redistricting claims as well. Section 2 has long been a vital tool for ensuring fair electoral maps. According to a recent Brennan Center analysis, Section 2 has played a critical role in addressing discrimination in redistricting, as evidenced by the more than 20 successful redistricting cases since the 2006 reauthorization of the VRA.

The VRAA would work in tandem with another piece of legislation, the For the People Act (H.R. 1). H.R. 1 sets national standards for fair, secure, and accessible elections; the VRAA targets jurisdictions and practices

with a history of discrimination. H.R. 1 would override existing discriminatory state laws and practices and replace them with a fair alternative; the VRAA would establish preclearance for future such laws and practices. Both are vitally needed to strengthen our democracy.

V. Conclusion

As the record before this Committee shows, the scourge of voting discrimination has exploded across the country, and it is especially acute and pervasive in selected jurisdictions. The John Lewis Voting Rights Advancement Act is carefully crafted to target and root out that discrimination where it is most persistent. The VRAA's preclearance provisions are not only eminently reasonable, justified, and consistent with the Constitution; they are also necessary to stem the relentless rise of discriminatory voting changes. Those preclearance provisions, coupled with new provisions to strengthen Section 2 of the VRA, would restore the VRA to its full strength before the Supreme Court dramatically weakened the law in *Shelby County* and *Brnovich*. That strength is badly needed now. We strongly urge Congress to enact the VRAA, as well as the For the People Act, into law.

STATEMENT OF JON GREENBAUM, CHIEF COUNSEL, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

U.S. HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND CIVIL LIBERTIES

Hearing on "Oversight of the Voting Rights Act: Potential Legislative Reforms"—August 16, 2021

INTRODUCTION

Chairman Cohen, Ranking Member Johnson, and Members of the Subcommittee on the Constitution, Civil Rights and Civil Liberties of the U.S. House of Representatives Committee on the Judiciary, my name is Jon Greenbaum and I serve as the Chief Counsel for the Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee"). Thank you for the opportunity to testify today on ways in which Congress can remedy the damage to racial equality in voting caused by the Supreme Court's decisions in *Shelby County v. Holder*, and *Brnovich v. Democratic National Committee*.

In 2013, the *Shelby County* decision effectively immobilized the preclearance provisions of Section 5 of the Voting Rights Act by finding its underlying coverage formula unconstitutional. The more recent *Brnovich* decision, while not gutting Section 2, makes it unnecessarily more difficult for plaintiffs to bring Section 2 vote denial "results" cases, running directly counter to Congress' intent in first enacting the Voting Rights Act in 1965, and then in broadening the scope of Section 2 of the Act in 1982. The weakening of Section 2 protections by the Court in *Brnovich* is particularly and sadly ironic, as the Court in *Shelby County* had pointed to the continued existence of Section 2's "permanent, nation-wide ban on racial discrimination" when it eviscerated the Section 5 protections.

The harm caused by *Shelby County* has been well-documented. The effects of *Brnovich* remain to be seen. However, it is not too late for Congress to act. The full protections of the Voting Rights Act are desperately needed today, particularly given the steps already taken—or about to be taken—by legislatures in states such as Georgia, Florida, and Texas in the aftermath of the 2020 election to raise additional barriers to the vote that will impact voters of color more severely than white voters. Moreover, there is a legitimate concern that some state

legislatures will be emboldened by their reading of *Brnovich*, as they were by the decision in *Shelby*, and view it as a signal from the Court to take even more suppressive action. Congress should immediately reassert its intention to fully protect the voting rights of voters of color in Sections 2 and 5 of the Voting Rights Act.

I come to this conclusion based on twenty-four years of working on voting rights issues nationally. From 1997 to 2003, I served as a Senior Trial Attorney in the Voting Section at the United States Department of Justice, where I enforced various provisions of the Voting Rights Act, including Section 5, on behalf of the United States. In the eighteen years since, I have continued to work on voting rights issues at the Lawyers' Committee for Civil Rights Under Law as Chief Counsel, where I oversee our Voting Rights Project, and prior to that, when I served as Director of the Voting Rights Project.

The Lawyers' Committee is a national civil rights organization created at the request of President John F. Kennedy in 1963 to pursue racial justice through mobilization of the private bar. Voting rights has been an organizational core area since the inception of the organization. During my time at the Lawyers' Committee, among other things, I was intimately involved in the constitutional defense of Section 5 and its coverage formula in *Shelby County* and its predecessor case *Northwest Austin Municipal Utility District No. 1 v. Holder*. I also staffed the National Commission on the Voting Rights Act, which issued a report entitled *The National Commission on the Voting Rights Act, Protecting Minority Voters: The Voting Rights Act at Work 1982-2005* (2006). The report and record of the National Commission on the Voting Rights Act, which was submitted to the House Judiciary Committee at the Committee's request, was the largest single piece of the record supporting the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 ("2006 VRA Reauthorization").

Our recommended responses to the *Shelby County* and *Brnovich* decisions stem from the different scope and rationales of the decisions themselves. The complete evisceration of Section 5 wrought by the *Shelby County* decision necessitates a comprehensive remedy, but one that is instructed by the reasoning of that decision and therefore considers both the unfortunate history of discrimination in voting in particular states and the current need for prophylactic measures to ensure that no state or sub-jurisdiction can implement a change in voting practices that discriminates against voters of color. The more limited impact of the *Brnovich* decision calls for a correspondingly focused response, one that zeroes in on the specific deviations of the Court from the clear intent of Congress in its 1982 amendments to Section 2.

Thus, our recommended response to the *Shelby County* decision starts with our support for provisions similar to those in the bill passed by the U.S. House of Representatives in the previous session of Congress: H.R. 4, 116th Congress, the John Lewis Voting Rights Advancement Act, i.e., a replacement coverage formula that would be applied to the preclearance provisions of Section 5 and the federal observer provisions of Section 8, and a transparency provision that requires all jurisdictions—irrespective of any coverage formula—to provide public notice of changes in voting practices. But, we have an additional recommendation, tied to the transparency provision: the creation of a "retrogression cause of action," that allows the Attorney General or private parties an opportunity to stop changes in voting prac-

tices anywhere in the country before they diminish the voting rights of voters of color. As I will discuss more fully in my testimony, the retrogression cause of action would meet the current need to stop suppressive laws that discriminate against voters of color, using a tried and true standard, with limited interference with state sovereignty, and without implicating issues relating to differentiation among the states.

Our recommended congressional response to *Brnovich* is more limited, as Congress does not have to completely rewrite Section 2. It simply has to remove any ambiguity in the statute caused by the *Brnovich* opinion, which gave short shrift to a substantial legislative record and decades of jurisprudence which run counter to the *Brnovich* majority's constricted view of this remedial statute. Congress originally enacted and later amended Section 2 to stymie not only blatant, explicit discrimination, but also facially neutral voting laws that, through ingenious, sophisticated methods, had a significant impact on minority citizens' right to vote. Consistent with this purpose, prior to *Brnovich*, the Supreme Court and several of the Circuit Courts of Appeal had adopted a standard to ensure the effective implementation of those protections. That standard recognized not only that the Act applies broadly to all voting procedures and policies that abridge the right to vote—whether expressly or subtly—but also that a challenged law cannot be viewed in isolation, because a seemingly innocuous voting practice can interact with underlying social conditions to result in pernicious discrimination.

Under that standard, Section 2 has worked for decades as a judicially manageable mechanism to stop voting discrimination. There has been no flood of questionable Section 2 vote denial "results" cases, and no widespread invalidation of voting regulations. Indeed, *Brnovich* marked the first time since the 1982 amendments to the Act that the Supreme Court reviewed a pure vote-denial claim. The reason is clear: The lower courts have taken seriously the Court's guidance, and carefully assessed the effects of challenged voting policies or procedures within each specific jurisdiction, based on the totality of the circumstances.

Brnovich compels an immediate response from this Congress, before some state legislators—intent on creating obstacles that disproportionately result in a negative impact on the rights of voters of color—hear it as a dog whistle to do just that, and before lower courts apply the opinion in ways that elevate unsubstantiated and untrue justifications for new burdensome voting practices over genuine and proved claims of racially discriminatory results.

I. Why and How Congress Must Respond to *Shelby County*

A. The State of Affairs Prior to the *Shelby County* decision

Prior to the *Shelby County* decision, the combination of Section 2 and Section 5 of the Voting Rights Act provided an effective means of preventing and remedying minority voting discrimination. Section 2, which is discussed more fully below, remains as the general provision enabling the Department of Justice and private plaintiffs to challenge voting practices or procedures that have a discriminatory purpose or result. Section 2 is in effect nationwide. Section 5 required jurisdictions with a history of discrimination, based on a formula set forth in Section 4(b), to obtain preclearance of any voting changes from the Department of Justice or the District Court in the District of Columbia before implementing the voting change. From its inception, there was a sunset provision for the formula, and the sunset provision for the 2006 Reauthorization was 25 years.

Section 5 covered jurisdictions had to show federal authorities that the voting change did not have a discriminatory purpose or effect. Discriminatory purpose under Section 5 was the same as the Fourteenth and Fifteenth Amendment prohibitions against intentional discrimination against minority voters. Effect was defined as a change which would have the effect of diminishing the ability of minority voters to vote or to elect their preferred candidates of choice. This was also known as retrogression, and in most instances was easy to measure and administer. For example, if a proposed redistricting plan maintained a majority black district that elected a black preferred candidate at the same black population percentage as the plan in effect, it would be highly unlikely to be found retrogressive. If, however, the proposed plan significantly diminished the black population percentage in the same district, it would invite serious questions that it was retrogressive.

Except in rare circumstances, covered jurisdictions would first submit their voting changes to the Department of Justice. DOJ had sixty days to make a determination on a change, and if DOJ precleared the change or did not act in 60 days, the covered jurisdiction could implement the change. The submission of additional information by the jurisdiction, which often happened because DOJ requested such information orally, would extend the 60 day period once by sending a written request for information to the jurisdiction. This often signaled to the jurisdiction that DOJ had serious concerns that the change violated Section 5. If DOJ objected to a change, it was blocked, but jurisdictions had various options, including requesting reconsideration from DOJ using Section 5 Procedures, seeking preclearance from the federal court and modifying the change and resubmitting it.

In the nearly seven years I worked at DOJ, I witnessed first-hand how effective Section 5 was at preventing voting discrimination and how efficiently DOJ administered the process to minimize the burdens to its own staff of attorneys and analysts, and to the covered jurisdictions. The Section 5 Procedures cited above provided transparency as to DOJ's procedures and gave covered jurisdictions guidance on how to proceed through the Section 5 process. Internal procedures enabled DOJ staff to preclear unobjectionable voting changes with minimal effort and to devote the bulk of their time to those changes that required close scrutiny.

The benefits of Section 5 were numerous and tangible. The 2014 National Commission Report provided the following statistics and information regarding DOJ objections:

"By any measure, Section 5 was responsible for preventing a very large amount of voting discrimination. From 1965 to 2013, DOJ issued approximately 1,000 determination letters denying preclearance for over 3,000 voting changes. This included objections to over 500 redistricting plans and nearly 800 election method changes (such as the adoption of at-large election systems and the addition of majority-vote and numbered-post requirements to existing at-large systems). Much of this activity occurred between 1982 (when Congress enacted the penultimate reauthorization of Section 5) and 2006 (when the last reauthorization occurred); in that time period approximately 700 separate objections were interposed involving over 2,000 voting changes, including objections to approximately 400 redistricting plans and another 400 election method changes."

"Each objection, by itself, typically benefited thousands of minority voters, and many objections affected tens of thousands,

hundreds of thousands, or even (for objections to statewide changes) millions of minority voters. It would have required an immense investment of public and private resources to have accomplished this through the filing of individual lawsuits."

In addition to the changes that were formally blocked, Section 5's effect on deterring discrimination cannot be understated. Covered jurisdictions knew that their voting changes would be reviewed by an independent body and they had the burden of demonstrating that they were non-discriminatory. By the time I began working at DOJ, Section 5 had been in effect for several decades and most jurisdictions knew better than to enact changes which would raise obvious concerns that they were discriminatory—like moving a polling place in a majority black precinct to a sheriff's office. In the post-Shelby County world, a jurisdiction is likely to get away with implementing a discriminatory change for one election (or more) before a plaintiff receives relief from a court, as the Hancock County, Georgia voter purge and Texas voter identification cases detailed later illustrate.

The Section 5 process also brought notice and transparency to voting changes. Most voting changes are made without public awareness. DOJ would produce a weekly list of voting changes that had been submitted, which individuals and groups could subscribe to in order to receive this weekly list from DOJ. For submissions of particular interest, DOJ would provide public notice of the change if it believed the jurisdiction had not provided adequate notice of the change. But even more important, the Section 5 process incentivized jurisdictions to involve the minority community in voting changes. DOJ's Section 5 Procedures requested that jurisdictions provide the names of minority community members who could speak to the change, and DOJ's routine practice was to call at least one local minority contact and to ask the individual whether she or he was aware of the voting change and had an opinion on it. Moreover, involved members of the community could affirmatively contact DOJ and provide relevant information and data.

B. The Shelby County Decision

In the Shelby County case, the Supreme Court decided in a 5-4 vote that the Section 4(b) coverage formula was unconstitutional. The majority held that because the Voting Rights Act "'impose[d] current burdens,'" it "'must be justified by current needs.'" The majority went on to rule that because the formula was comprised of data from the 1960s and 1970s, it could not be rationally related to determining what jurisdictions, if any, should be covered under Section 5 decades later. The four dissenting justices found that Congress had demonstrated that regardless of what data was used to determine the formula, voting discrimination had persisted in the covered jurisdictions. The majority made clear that "[w]e issue no holding on §5 itself, only on the coverage formula. Congress may draft another formula based on current conditions."

The effect of the Shelby County decision is that Section 5 is effectively immobilized as, for now, preclearance is limited only to those jurisdictions where it is imposed by a court after a court previously made a finding of intentional voting discrimination. This special preclearance coverage is authorized by Section 3(c) of the Act. Courts have rarely ordered Section 3(c) coverage, and when they do, it is typically quite limited. Indeed, the only jurisdictions I am aware of that have been subject to Section 3(c) coverage since the Shelby County decision are Pasadena, Texas and Evergreen, Alabama.

As a result, Section 5 is essentially dead until Congress takes up the Supreme Court's invitation to craft another coverage formula. There are compelling reasons for Congress to do so because voting discrimination has increased in the absence of Section 5, and Section 2 cannot adequately substitute for Section 5.

C. The Effect of the Shelby County Decision

The year after the Shelby County decision was issued, the Executive Summary and Chapter 3 of the 2014 National Commission Report discussed what was lost in the Shelby County decision. We identified the following impacts:

Voting rights discrimination would proliferate, particularly in the areas formerly covered by Section 5;

Section 2 would not serve as an adequate substitute for Section 5 for numerous reasons:

The statutes are not identical but were instead intended to complement one another;

Section 5 prevents a discriminatory voting change from ever going into effect whereas discrimination can affect voters in a Section 2 case prior to a court decision or a settlement;

Section 2 litigation is time-consuming and expensive compared to Section 5 which is efficient and less-resource intensive;

Section 2 is less likely to prevent discrimination than Section 5 because:

Under Section 2 plaintiffs have the burden whereas under Section 5, jurisdictions have the burden of proof;

Section 2 has a complicated multi-factor test that provides numerous defenses for jurisdictions, whereas Section 5 has a simple retrogression test.

The Shelby County decision, and DOJ's interpretation that it also bars use of the coverage formula for sending federal observers, has left voting processes vulnerable to discrimination.

The subsequent years have demonstrated that all of the negative impacts we anticipated have come to pass.

D. Voting Rights Discrimination has Proliferated Since Shelby County, Particularly in the Areas Formerly Covered by Section 5

The Lawyers' Committee's Voting Rights Project has never been busier than in the post-Shelby County years, where we have participated as a counsel to a party or as amici in more than 100 voting rights cases. Because the Lawyers' Committee has a specific racial justice mission, all of the cases we have participated in implicate race in some fashion in our view, even if there are no race claims in the case.

In my 2019 testimony before this Subcommittee, I did a deeper dive into the 41 post-Shelby County voting rights cases the Lawyers' Committee had filed up to that time. My testimony reflected that voting discrimination remains alive and well, particularly in the states formerly covered by Section 5. The findings included the following:

In the thirty-seven cases where we sued state or local governments, twenty-nine (78.3 percent) involved jurisdictions that were covered by Section 5, even though far less than half the country was covered by Section 5. Moreover, we sued seven of the nine states that were covered by Section 5 (Alabama, Arizona, Georgia, Louisiana, Mississippi, Texas, Virginia), as well as the two states that had were not covered but had a substantial percentage of the population covered locally (North Carolina and New York).

We achieved substantial success. Of the thirty-three cases where there had been some result at the time, we achieved a positive result in 26 of 33 (78.8 percent). In most

of the seven cases where we were not successful, we had filed emergent litigation—either on Election Day or shortly before—where achieving success is most difficult.

This data tells us that voting discrimination remains substantial, especially considering that the Lawyers' Committee is but one organization, and particularly in the areas previously covered by Section 5.

In 2019, the Lawyers' Committee did a 25 year look back on the number of times that an official entity made a finding of voter discrimination. This analysis of administrative actions and court proceedings identified 340 instances between 1994 and 2019 where the U.S. Attorney General or a court made a finding of voting discrimination or where a jurisdiction changed its laws or practices based on litigation alleging voting discrimination. We found that the successful court cases occurred in disproportionately greater numbers in jurisdictions that were previously covered under Section 5.

E. Why Section 2 is an inadequate substitute for Section 5

Prior to the Shelby County decision, critics of Section 5 frequently minimized the negative impact its absence would have by pointing out that DOJ and private parties could still stop discriminatory voting changes by bringing affirmative cases under Section 2 of the Voting Rights Act. Indeed, in the same paragraph of Shelby County where the Supreme Court majority states that Congress could adopt a new formula for Section 5, it also notes that its "decision in no way affects the permanent, nation-wide ban on racial discrimination in voting found in §2."

During the Shelby County litigation and the reauthorization process preceding it, defenders of Section 5 repeatedly pointed out why Section 2 was an inadequate substitute. Eight years of experience demonstrate this.

This is hardly a surprise given that Section 5 and Section 2 were designed by Congress to complement one another as part of a comprehensive set of tools to combat voting discrimination. Section 5 was designed to prevent a specific problem—to prevent jurisdictions with a history of discrimination from enacting new measures that would undermine the gains minority voters were able to secure through other voting protections, including Section 2. The Section 5 preclearance process was potent, but also efficient and surgical in its limited geographic focus and sunset provisions. It was also relatively easy to evaluate because the retrogressive effect standard—whether minority voters are made worse off by the proposed change—is simple to determine in all but the closest cases. Section 5 is designed to protect against discriminatory changes to the status quo.

Section 2 is quite different. It evaluates whether the status quo is discriminatory and thus must be changed. The test for liability should be, and is, rigorous because it is a court-ordered change. Although Section 2 (results) and Section 5 (retrogression) both have discriminatory impact tests, they are distinct. As discussed above, the Section 5 retrogression test is quite straightforward in determining whether a jurisdictional-generated change should be blocked—will minority voters be worse off because of the change?

In contrast, the Section 2 results inquiry is complex and resource intensive to litigate. As will be discussed in greater detail below in the context of the Brnovich decision, the "totality of circumstances" test set forth in the statute is fact-intensive by its own definition. The Senate Report supporting the 1982 amendment to Section 2 lists factors that courts have used as a starting point in

applying the totality of circumstances test to include seven such factors (along with two factors plaintiffs have the option to raise). On top of the Senate factors, courts have introduced additional requirements. For example, in vote dilution cases, which typically involve challenges to redistricting plans or to a method of election, the plaintiff must first satisfy the three preconditions set forth by the Supreme Court in *Thornburg v. Gingles*, before even getting to the Senate factors. These *Gingles* preconditions require plaintiffs to show that a minority group is compact and numerous enough to constitute a majority of eligible voters in an illustrative redistricting plan and whether there is racially polarized voting (minority voters are cohered in large number to support certain candidates and those candidates are usually defeated because of white bloc voting) and are necessarily proven by expert testimony. In vote denial cases, which involve challenges to practices such as voter identification laws, courts have also added an additional test, with the developing majority view requiring that plaintiffs demonstrate that the challenged law imposes a discriminatory burden on members of a protected class and that this "burden must be in part caused by or linked to social conditions that have or currently produce discrimination against members of the protected class.

The result is that Section 2 cases are extremely time-consuming and resource-intensive, particularly when defendants mount a vigorous defense. For example, *United States v. Charleston County*, which I litigated at the Department of Justice, was a successful challenge to the at-large method of electing the Charleston (South Carolina) County Council. The litigation took four years, and it involved more than seventy witness depositions and a four-week trial, even though we had prevailed on the *Gingles* preconditions on summary judgment, and needed to litigate only the totality of circumstances in the district court.

Four specific examples from the Lawyers' Committee's litigation record illustrate why Section 2 is an inadequate substitute for Section 5. The first and most prominent example is the Texas voter identification law, which illustrates the time and expense of litigating a voting change under Section 2 that both DOJ and the federal district court found violated Section 5 prior to the Shelby County decision. The afternoon that Shelby County was decided, then-Texas Attorney General Greg Abbott announced that the State would immediately implement the ID law. Several civil rights groups, including the Lawyers' Committee, filed suit in Texas federal court, challenging SB 14 under several theories, including Section 2, and DOJ filed its own suit under Section 2, and ultimately all of the cases were consolidated. The parties then embarked on months of discovery, leading to a two-week trial in September 2014, where dozens of witnesses, including 16 experts—half of whom were paid for by the civil rights groups—testified. Prior to the November 2014 election, the District Court ruled that SB 14 violated the "results" prong of Section 2 of the Voting Rights Act, because it had a discriminatory result in that Black and Hispanic voters were two to three times less likely to possess the SB 14 IDs and that it would be two to three times more burdensome for them to get the IDs than for white voters. The District Court's injunction against SB 14, however, was stayed pending appeal by the Fifth Circuit, so the law—now deemed to be discriminatory—remained in effect. Subsequently, a three-judge panel and later an en banc panel of the Fifth Circuit Court of Appeals, affirmed the District Court's finding. As a result, elections that took place from

June 25, 2013 until the Fifth Circuit en banc opinion on July 20, 2016 took place under the discriminatory voter ID law. Had Section 5 been enforceable, enormous expense and effort would have been spared. The district court awarded private plaintiffs \$5,851,388.28 in attorneys' fees and \$938,945.03 in expenses, for a total of \$6,790,333.31. The fee award is currently on appeal. As of June 2016, Texas had spent \$3.5 million in defending the case. Even with no published information from DOJ, more than \$10 million in time and expenses were expended in that one case.

Second, in *Gallardo v. State*, the Arizona legislature passed a law that applied only to the Maricopa County Community College District and added two at-large members to what was previously a five-member single district board. The legislature had submitted the change for Section 5 preclearance. The Department of Justice issued a more information letter based on concerns that the addition of two at-large members, in light of racially polarized voting in Maricopa County, would weaken the electoral power of minority voters on the board. After receiving the more information letter, Arizona officials did not seek to implement the change. Only after the Shelby County decision did they move forward, precipitating the lawsuit brought by the Lawyers' Committee and its partners. We could not challenge the change under Section 2, especially because we would not have been able to meet the first *Gingles* precondition. Instead we made a claim in state court alleging that the new law violated Arizona's constitutional prohibition against special laws because the board composition of less populous counties was not changed. Reversing the intermediate court of appeal, the Arizona Supreme Court rejected our argument, holding that the special laws provision of the state constitution was not violated. Unsurprisingly, the Latino candidate who ran for the at-large seat in the first election lost and the two at-large members are white.

Third, in 2015, the Board of Elections and Registration, in Hancock County, Georgia, changed its process so as to initiate a series of "challenge proceedings" to voters, all but two of whom were African American. This resulted in the removal of 53 voters from the register. Later that year, the Lawyers' Committee, representing the Georgia State Conference of the NAACP and the Georgia Coalition for the Peoples' Agenda and individual voters, challenged this conduct as violating the Voting Rights Act and the National Voter Registration Act, and obtained relief which resulted in the placement of unlawfully-removed voters back on the register. Ultimately, plaintiffs and the Hancock County Board agreed to the terms of a Consent Decree that would remedy the violations, and required the county's policies to be monitored for five years. But after the purge and prior to the court order, Sparta, a predominantly black city in Hancock County, elected its first white mayor in four decades. And before the case was settled, and the wrongly-purged voters placed back on the rolls, at least one of them had died.

The fourth matter is ongoing and reflects the significant present-day impact of the Shelby County decision and the loss of Section 5. It involves a law that Georgia, a previously covered jurisdiction, enacted this year, SB 202, a 53 section, 98-page law that changes many aspects of Georgia elections. It has spawned several federal lawsuits, most of which include voting discrimination claims. The Lawyers' Committee is counsel in the one of these suits.

The litigation will unquestionably be resource intensive even if the various cases are fully or partially consolidated and the Plaintiffs engage in substantial coordination. It

will require numerous experts and extensive fact discovery. There will be elections—and possibly multiple cycles of elections—that will occur before Plaintiffs will have the evidence needed to establish a constitutional or Section 2 violation and the court will set aside the time to hear and decide the claims. If Plaintiffs prevail, Georgia will undoubtedly appeal and even more time will pass.

But for the Shelby County decision, there would be no SB 202, at least not in its current form, because at least some aspects of SB 202 appear to be clearly retrogressive and probably would not have been proposed in the first place. This is perhaps most clearly demonstrated by Georgia introducing several restrictions focused on voting by mail:

The new absentee ballot ID requirements mandate that voters include a Georgia Driver's license number or Georgia State ID number on their absentee ballot application. If they have neither, voters are required to copy another form of acceptable voter ID and attach the copies of ID documents along with other identifying information to both their absentee ballot applications and inside the absentee ballot envelope when returning the voted ballot.

The bill also prohibits public employees and agencies from sending unsolicited absentee ballot applications to voters, yet threatens private individuals and organizations who are not so prohibited with a substantial risk of incurring hefty fines for every application they send to an individual who has not yet registered to vote or who has already requested a ballot or voted absentee.

SB 202 significantly limits the accessibility of absentee ballot drop boxes to voters. While all counties would be required to have at least one, the placement of drop boxes is limited to early voting locations and drop boxes are available only to voters who can enter the early voting location during early voting hours to deposit their ballot inside the box. Thus, drop boxes are essentially useless to voters who can vote early in-person or who cannot access early voting hours at all due to work or other commitments during early voting hours.

The bill also mandates an earlier deadline of 11 days before an election to request an absentee ballot, leaving some voters who become ill or have to travel out of the area in the lurch if they cannot vote during early voting and are unable to meet the earlier deadline to apply for a ballot.

These restrictions were adopted right after the November 2020 election, where voters of color used absentee ballots to an unprecedented degree, and in the cases of Black (29.4 percent) and Asian (40.3 percent) voters, at higher rates than white (25.3 percent) voters. Given this seemingly disproportionate impact on voters of color, I believe that if Georgia were subject to Section 5, these provisions would have been found retrogressive, and never would have been in effect. Instead, these provisions will be contested through time and resource intensive litigation under complex legal standards.

F. The Impact of Shelby County on the Loss of Observer Coverage

A less discussed impact of the Shelby County decision is on the loss of federal observer coverage. Under Section 8 of the Voting Rights Act, the federal government had the authority to send federal observers to monitor any component of the election process in any Section 4(b) jurisdiction provided that the Attorney General determined that the appointment of observers was necessary to enforce the guarantees of the 14th and 15th Amendments. A federal district court can also authorize the use of observers when the court deems it necessary to enforce the guarantees of the 14th or 15th Amendments

as part of a proceeding challenging a voting law or practice under any statute to enforce the voting guarantees under the 14th or 15th Amendment.

In the 2014 National Commission report, we determined that the Attorney General had certified 153 jurisdictions in eleven states for observer coverage and that the Department of Justice had sent several thousand observers to observe several hundred elections from 1995 to 2012.

While officially not stating this, the practice of the Department of Justice has been to apply the Supreme Court's finding that the Section 4(b) coverage formula is unconstitutional not just to preclearance, but to observer coverage. The Shelby County decision has reduced observer coverage to a trickle. The Department of Justice has instead employed what it calls "monitors."

The difference between federal observers and monitors is dramatic. Under the Voting Rights Act, "Observers shall be authorized to—(1) enter and attend at any place for holding an election in such subdivision for the purpose of observing whether persons who are entitled to vote are being permitted to vote; and (2) enter and attend at any place for tabulating the votes cast at any election held in such subdivision for the purpose of observing whether votes cast by persons entitled to vote are being properly tabulated." Monitors have no such rights: a jurisdiction does not need to provide any access to the voting process to any monitor.

It is not difficult to see the difference in how this plays out in practice. In a year where legislatures in formerly covered states like Arizona and Texas are conducting audits of election results or considering restricting the ability of election officials to limit the conduct of partisan poll watchers, it becomes vitally important for the federal government to have discretion to send observers to places with a history of voting discrimination for the purpose of ensuring that processes are fair and that voters of color are not disenfranchised.

G. Proposed Congressional Response to Shelby County

In 2019, the House passed H.R. 4, also known as the John Lewis Voting Rights Advancement Act, named after one of the true giants of our lifetimes, a person who literally put his life on the line so that others could vote free of discrimination on the basis of the color of their skin. Now is the time for Congress to honor his memory with passage of a bill that resuscitates Section 5.

H.R. 4 contains many beneficial provisions. It creates a new formula that determines which states would be subject to the preclearance provisions of Section 5, based on clearly defined incidents of voting rights violations; it creates a practice-based preclearance process applicable nationwide, based on clearly defined covered practices that have been shown to be particularly susceptible to use in a discriminatory fashion; it clarifies the authority of the Attorney General to assign observers to enforce constitutional and statutory protections of the right to vote; and it creates a "transparency" requirement for all states and political subdivisions to provide public notice of any change in voting practices or procedures.

We respectfully suggest that more is needed, and that the "transparency" requirement provides the appropriate vehicle for our recommendation. The "transparency" provision in the prior H.R. 4, requires that any State or political subdivision that makes any change in a voting practice or procedure in any election for Federal office that results in a difference with that which has been in place 180 days before the date of the Federal

election must provide reasonable and detailed public notice of the change within 48 hours. Additional, specific requirements for notice are provided as for polling place changes for Federal elections and for the changes in the constituency that will participate in any election through redistricting or reapportionment.

We agree that notice by any state or political subdivision of changes in voting practices or procedures and to any prerequisite to voting is essential to any effective response to the Shelby County decision, but we see no reason to limit the notice requirement to changes affecting Federal elections.

Second, while notice is of overarching importance, more is needed. There must be an opportunity for voters, and those statutorily charged with protecting the civil rights of voters, to analyze the proposed change, and, if necessary, seek judicial relief if it appears that the change will be discriminatory. Thus, we propose a relatively modest waiting period of 30 days after notice is given before the change may be implemented. This leads to our third, and most important, recommendation. As is implicit in the creation of a waiting period before a change in voting practices may take effect, there must be the concomitant creation of a cause of action that allows for a determination as to whether the change may be implemented. For that, we recommend consideration of a standard that has been time-tested in the context of the pre-Shelby County Section 5 litigation: the retrogression standard. We recommend that the United States or an aggrieved party be granted the right to bring an action if the voting change would have the effect of diminishing the ability to vote of any citizens of the United States on account of race or color on in contravention of the guarantees set forth in the language minority provisions of the Voting Rights Act. It has long been settled that "the purpose of §5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral [process]." However, compared with Section 5, which requires the state to prove a lack of discriminatory purpose or effect, the cause of action we recommend would require the Attorney General or an aggrieved party to prove retrogression.

The "retrogression cause of action" provides an additional, reasonable, and necessary weapon in the fight against suppressive and discriminatory voting practices. First, and most important, it responds to current needs, which are not limited to those states and political sub-divisions that may be subject to geographic coverage or which attempt to implement practices known to be susceptible to discriminatory applications. As of July 14, 2021, at least 18 states had enacted laws this year that made it harder to vote. These laws were passed not only in states like Georgia and Arizona, that were previously covered by Section 4 of the Voting Rights Act, but also by states not previously covered, such as Indiana, Idaho, Kansas, Montana, Nevada, Oklahoma, Utah, and Wyoming, and included provisions not captured in the "known practices" category, including those that make mail voting and early voting more difficult.

We believe that these amendments, individually and collectively, are constitutional under the current constitutional framework under the Fourteenth and Fifteenth Amendments. These amendments would respond to the current problems of jurisdictions enacting retrogressive voting changes that may be difficult to challenge under other provisions. In comparison to the needs addressed under this proposal, the burdens created under this proposal are relatively modest. The requirement of providing notice of changes provides

almost no burden, as it would take little effort to provide notice. The concept of a stand-still period before a jurisdiction can implement a change is not unknown in our laws, and is required when interests that have less or no constitutional protection as compared with the right to vote, are at stake. Given that most voting changes are not instituted—and should not be instituted—too close to an election, the 30-day stand-still would have limited adverse impact on states and political subdivisions, but would provide the substantial benefit of allowing voters time to assess the potential effect of the change.

Furthermore, the burden of creating a cause of action prohibiting retrogressive voting changes is constitutionally acceptable under the circumstances. The Supreme Court has stated that Congress has the enforcement authority to address voting changes that have a discriminatory effect. In addition, because numerous other civil rights laws allow for discriminatory effect causes of action, including Title VII of the Civil Rights Act of 1964, involving employment discrimination, and the Fair Housing Act of 1968, permitting such a cause of action is hardly unusual.

Finally, creating a cause of action for retrogression nationally does not implicate the concerns about the equal sovereignty of the States, expressed by the majority in the Shelby County decision. The retrogression cause of action should not be a threat to those jurisdictions whose proposed voting practices changes are intended to make it easier for voters to vote, because a party would have to successfully bring suit in order to stop the change, which seems implausible under the circumstances. The burden is placed on the party challenging the change. Proving retrogression is not as complicated as proving discriminatory results under Section 2, but it is a high standard, and history has taught us that it is perfectly suitable to assess the discriminatory effects of proposed changes in voting practices.

Why and How Congress Must Respond to Brnovich

A. Section 2 of the Voting Rights Act

From the ratification of the Fifteenth Amendment in 1870 through the 1960s, the federal government tried—and failed—to defeat the “insidious and pervasive evil” of “racial discrimination in voting,” which had been “perpetuated . . . through unrelenting and ingenious defiance of the Constitution.” Although Justice Frankfurter wrote long ago that the Fifteenth Amendment targeted “contrivances by a state to thwart equality in the enjoyment of the right to vote” and “nullified[d] sophisticated as well as simpleminded modes of discrimination[.]” prior to the VRA’s passage, this language proved largely aspirational.

Responding to the states’ tenacious “ability . . . to stay one step ahead of federal law,” Congress passed the VRA to provide a “new weapon[] against discrimination.” The Act “reflect[ed] Congress’ firm intention to rid the country of racial discrimination in voting.” The essence of the VRA’s protections was exemplified in Section 2, which provided: “No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.”

Notwithstanding Section 2’s broad language, jurisdictions sought to evade its reach by placing “heavy emphasis on facially neutral techniques.” These “techniques” included everything from “setting elections at inconvenient times” to “causing . . . election day irregularities” to “moving

polling places or establishing them in inconvenient . . . locations.” In one Mississippi county, voters were forced to “travel 100 miles roundtrip to register to vote.” In one Alabama county, “the only registration office in the county [was] closed weekends, evenings and lunch hours.” These regulations ostensibly governed the time, place, and manner of voting in a neutral way, but they “particularly handicap[ed] minorities.”

Against this backdrop, and responding to this Court’s plurality decision in *City of Mobile v. Bolden*, which had read into Section 2 a “discriminatory purpose” element, Congress expressly expanded Section 2, now codified at 52 U.S.C. § 10301. As amended, Section 2 prohibits any “voting qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.” Congress further specified that, under Section 2, a violation is established if, “based on the totality of [the] circumstances,” the political processes leading to an election are not “equally open to participation” by minority voters so that they have less opportunity than white voters “to participate in the political process and to elect representatives of their choice.” By adopting this “results test,” Congress captured the “complex and subtle” practices which “may seem part of the everyday rough-and-tumble of American politics” but are “clearly the latest in a direct line of repeated efforts to perpetuate the results of past voting discrimination.”

Section 2 provides relief for both vote dilution—schemes that reduce the weight of minority votes—and vote denial—standards, practices, or procedures that impede minority citizens from casting votes or having their votes counted. Vote-denial cases were the paradigmatic, “first generation” cases brought under Section 2. Only later did the Supreme Court “determine[] that the Act applies to ‘vote dilution’ as well.”

Thirty-five years ago, in *Gingles v. Thornburg*, the Court recognized that Congress inserted the words “results in” to frame the Section 2 inquiry. Instead of asking whether, in a vacuum, a voting practice facially sounds as if it denies or abridges the rights of minority voters, the question is: in context, does the practice “interact” with pre-existing social and historical conditions to result in that burden? Answering this question requires courts to examine the challenged practice not as a theoretical postulate, but as a law or regulation that interacts with real-world conditions and must be evaluated through a fact-heavy, “intensely local appraisal,” that accounts for the “totality of [the] circumstances.”

In *Gingles*, the Court explained the “essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the [voting] opportunities enjoyed by black and white voters.”⁸⁰ Recognizing Section 2’s command that courts consider the “totality of circumstances,” the *Gingles* Court looked to the Senate Report accompanying the 1982 amendments to compile a list of relevant “circumstances.” These nine social and historical conditions—the “Senate Factors”—include considerations such as the history of official discrimination in the jurisdiction (Factor One); the extent of discrimination in the jurisdiction’s education, employment, and health systems (Factor Five); and whether the challenged practice has a tenuous justification (Factor Nine).

Since *Gingles*, four different Circuits addressing vote-denial cases have used the foundation laid in *Gingles* to analyze these

matters. This formulation distills Section 2 liability into a two-part test: (1) there must be a disparate burden on the voting rights of minority voters (“an inequality in the opportunities enjoyed”); and (2) that burden must be caused by the challenged voting practice (“a certain electoral law, practice, or structure . . . cause[s] an inequality”) because the practice “interacts with social and historical conditions” of racial discrimination. No other Circuit has put forth an alternative formulation.

B. The Facts of Brnovich

That was the situation until *Brnovich*. In *Brnovich*, the Supreme Court reviewed two Arizona voting practices: one mandated that votes cast out of the voter’s precinct (“OOP”) not be counted; the other prohibited the collection of mail-in ballots by anyone other than an election official, a mail carrier, or a voter’s family member, household member or caregiver. Plaintiffs had claimed that these practices violated Section 2 of the Voting Rights Act.

The United States District Court for the District of Arizona had ruled against the plaintiffs on both claims, but, applying the settled standards described above, the United States Court of Appeals for the Ninth Circuit had reversed, en banc, finding that the out-of-precinct policy violated the “results” prong of Section 2 and that the limitations on collections of absentee ballots violated both the “results” and “intent” prongs of Section 2.

As to the out-of-precinct policy, the Ninth Circuit identified several factors, acknowledged by the district court, leading to a higher rate of OOP voting by voters of color than by white voters: frequent changes in polling locations (polling places of voters of color experienced stability at a rate 30 percent lower than the rate for whites); confusing placement of polling locations (indigenous populations in particular lived farther from their assigned polling places than did white voters); and high rates of residential mobility. As a result, 1 in every 100 Black voters, 1 in every 100 Latinx voter, and 1 in every 100 indigenous peoples voter cast an OOP ballot, compared to 1 in every 200 white voters.

As to the absentee-ballot collection limitation, the Ninth Circuit relied on the district court’s finding that voters of color were more likely than white voters to return their early ballots with the assistance of third parties. The disparity was the result of the special challenges experienced by communities that lack easy access to outgoing mail services, socioeconomically disadvantaged voters who lacked reliable transportation, and voters who had trouble finding time to return mail because they worked multiple jobs or lacked childcare services, all burdens that disproportionately fall on Arizona’s minority voters.

Applying the “totality of circumstances” test, with primary reliance on the Senate factors that demonstrated a history of discrimination in Arizona that persists to this day, the Ninth Circuit found that both the OOP policy and the absentee-ballot collection law violated the “results” prong of Section 2 of the VRA. The court also found that the absentee ballot law had been enacted with discriminatory intent, based on statements of the sponsor and a racist video used to promote passage of the law.

C. The Brnovich Decision: Its Meaning, and Its Consequences

In *Brnovich*, a 6–3 Court reversed the Ninth Circuit’s decision. Had it done so by applying the settled standards, we may not be here today. But, in writing for the Court’s majority, Justice Alito provided guidelines for future treatment of Section 2 vote denial “results” cases that were not only new, but also

contrary—or at least dilutive of—the decades-long accepted standards.

I emphasize Brnovich does not spell the end of Section 2 cases. Rather, it unnecessarily and unreasonably makes it more difficult for civil rights plaintiffs to win Section 2 actions, when they already were difficult to prevail. And it does so in a way that flies in the face of congressional intent. Further, it raises too many ambiguities in too many important areas to leave it to the courts to fill in the blanks. The greater difficulty and ambiguity threaten to undermine the core purpose of the Voting Rights Act.

1. Brnovich is a solution in search of a problem

First, Brnovich purports to cure a non-existent problem. One of the premises of Brnovich is that “[i]n recent years, [Section 2 vote denial claims] have proliferated in the lower courts.” In support of this statement, the Court relies on the amicus curiae briefs of Sen. Ted Cruz, the State of Ohio, and the Liberty Justice Center. However, those briefs describe a total of perhaps 16 cases, dating back over 7 years, and only 3 of them led to a finding of Section 2 liability.

The fact is that since Congress amended Section 2 in 1982 and since the Supreme Court supplied its test for adjudicating Section 2 violations, the Supreme Court has never deemed it necessary to review a single Section 2 vote-denial case. At the same time, there was absolutely no evidence that courts were being overwhelmed by Section 2 vote denial cases. And when such cases are brought, courts have had no trouble applying the standard to separate discriminatory voting practices from benign election regulations. In short, the pre-existing standard had worked well.

2. Brnovich reads a remedial statute narrowly

One of the most important canons of statutory construction—and one that gives the greatest deference to congressional intent—is that remedial statutes are to be broadly construed, and there are few statutes in this Nation’s history more remedial than the Voting Rights Act of 1965. Yet, rather than read the Act expansively, the Court created new stringent “guideposts,” most prominently suggesting higher standards for both the size of the burden and the size of the disparity, and a lower standard for the State to meet to justify the burdens it is placing on the right to vote.

The purported touchstone of the Brnovich opinion is the Court’s construction of the requirement in Section 2(b) that the political process be “equally open” as the “core” requirement of the law. The concept of equal “opportunity” as used in the same statute, the Court acknowledged somewhat grudgingly, “may stretch that concept to some degree to include consideration of a person’s ability to use the means that are equally open.” In that context, the Court turned to the “totality of the circumstances” test, and said that “any circumstance that has a logical bearing on whether voting is ‘equally open’ and afford equal ‘opportunity’ may be considered,” and proceeded to list five “important circumstances” that were relevant.

Some of these “important circumstances” seem fairly innocuous on their face: e.g., the size of the burden, the size of the disparity. Others not so much: e.g., the degree of departure of the challenged practice from practices standard when Section 2 was amended in 1982 or which are widespread today, and the opportunities provided by the electoral process as a whole. Another has never been deemed relevant to Section 2 analysis: the strength of the state’s justification for the practice—except in connection with assessment of the tenuousness of that justifica-

tion. Overall, however, the devil is in the details, and in the ambiguities created by the Court’s specific choice of language that may pave the way for state legislatures to enact additional discriminatory laws and for lower courts to apply Section 2 parsimoniously in vote denial “results” cases.

3. The size of the burden should include factors specific to the affected community resulting from discrimination

The first factor that Justice Alito highlighted was the “size of the burden,” emphasizing that voters “must tolerate the usual burden of voting.” The application of this “guidepost” by legislatures and lower courts might be colored by a footnote at the end of the paragraph on burden, where Justice Alito expounded on what “openness” and “opportunity” might mean (as, say, with museums or school courses that are open to all) as compared to the “absence of inconvenience” (such as lack of adequate transportation or conflicting obligations). The vagueness with which the Court left this issue, and its relegation to a footnote, may limit its precedential impact, but its practical impact may be substantial.

What Justice Alito does not acknowledge is that some of these indicia of what he calls “inconvenience” are themselves not simply subjective to an individual, but, are reflective of a group’s socio-economic circumstances, that are themselves the product of a history of discrimination. In the Texas Photo ID case, for example, we were able to demonstrate that not only were Black and Latinx voters more likely than white voters not to possess the required photo ID, but that they were more likely than white voters not to be able to get the ID because of, among other reasons, lack of access to transportation.

The same logic might apply to polling place location and closure decisions that might make it just that much more burdensome for voters of color than for white voters to vote. Or, as in the new Georgia statute, SB 202, prohibiting line relief—the provision of food and water to those waiting in line to vote—particularly when voters of color are much more often confronted with long wait-times than are white voters.

Mandating additional voter ID requirements in order to submit an application for an absentee ballot or to return a voted absentee ballot is another new hurdle voters will now face in Georgia under its new omnibus bill. Under this provision, voters requesting an absentee ballot must submit with their application their driver’s license number, their personal identification number on a state-issued personal identification card, or a photocopy of other specified forms of identification. For voters who do not have a Georgia’s driver license or state ID card number, voting absentee will now require access to photocopy technology. Voters without such access to technology will face a higher burden in complying with these ID requirements. Recent data shows that Black Georgians are 58 percent more likely and Latinx Georgians are 74 percent more likely to lack computer access in their homes as compared to their white counterparts. Thus, we can expect voters of color to face a significantly higher burden than white voters in complying with the ID requirements for requesting and returning absentee ballots.

If Brnovich is construed by state legislatures as permitting them to impose barriers that affect different racial or ethnic groups differently because of their relative wealth—particularly when those differences are themselves the product of historic discriminatory practices—it will have a serious impact on the voting rights of persons of color.

4. 1982 Standards and Widespread Practice Are Not Important

Second, Justice Alito said that other relevant factors included the degree of departure of the challenged practice from the “standard practice when §2 was amended in 1982,” a choice which is largely left unexplained, other than in rebuttal to Justice Kagan’s dissent, in which he writes, somewhat tautologically, that “rules that were and are commonplace are useful comparators when considering the totality of the circumstances.” Although the Court acknowledges that this would not apply to practices that themselves were discriminatory in 1982, the fact is that such benchmarks are neither necessary nor productive. If the history of voter discrimination in this country has taught us anything, it is that those who want to stop voters of color from voting change their methods with the times, and with the change in the ways voters of color are voting.

Again, Georgia is illustrative. In Georgia, state legislators responded to the record-shattering turnout of 2020 by passing omnibus legislation that restricts the right to vote at nearly every step of the process and disproportionately affects voters of color. Among its provisions, the law requires voter identification in order to request an absentee ballot and vote absentee; severely limits access to absentee ballot drop boxes; and significantly shortens the period in which voters can apply for and cast absentee ballots. These restrictions were adopted right after the November 2020 election where voters of color used absentee ballots to an unprecedented degree, and in the cases of Black (29.4 percent) and Asian (40.3 percent) voters, at higher rates than white (25.3 percent) voters. But, Justice Alito’s reasoning may be construed as supporting the proposition that, if in 1982, Georgia did not make absentee ballots universally available, that could be a “highly important” consideration, even if voters of color are more heavily impacted than white voters by these changes. State legislatures should not be led to believe that they can get away with erecting new barriers to vote based on what they did 40 years ago.

Further, Justice Alito also observed that the “widespread” present day acceptance of the voting practice could justify its use. But it was precisely because certain discriminatory practices were “widespread” that the Voting Rights Act was necessary. It seems incongruous, if not irrational, to justify discrimination by the majority population against minority populations on the basis of “widespread” acceptance.

5. So-called “small differences” can be important

Third, in explaining the importance of the size of the disparities, Justice Alito indicates that “small differences should not be artificially magnified,” again dealing obliquely with the consequences of the differences being caused by differences in wealth—which may themselves be the result of historic racial discrimination. Specifically, the Court criticized the Ninth Circuit for finding disproportionate impact based on a relative comparison of the percentage of voters whose votes were rejected because they were cast out of precinct. In the case of Indigenous, Black, and Latinx voters, the percentage was 1% for each group; in the case of white voters, the percentage was .05.

The Court neglected to note that the discriminatory out of precinct practice meant that almost 4,000 votes cast by voters of color had been rejected—and that if their circumstances were equivalent to those of white voters, 2,000 of their votes would have counted.

The Texas Photo ID case is illustrative. There, the court found that, even though over 90 percent of all groups had the required ID, Black voters were twice as likely as white voters not to have the ID, and Latinx voters were about three times as likely. In fact, the court found that 608,470 Texas voters lacked the ID. Obviously, the Texas numbers are meaningful no matter how viewed. But the point is that smaller numbers may be too. Legislatures and lower courts should not be led to believe that they can chip away at electoral margins by reducing the likelihood of voters of color being able to cast their votes, no matter how small the effect. We need not dwell on the closeness of the 2020 presidential election in Arizona, Georgia, and Wisconsin to underscore the importance of even small differentials in impact.

6. Other opportunities to vote do not necessarily ameliorate discrimination in particular methods of voting

Fourth, Justice Alito explained that the opportunities provided by the entire electoral system should be factored into the equation, implying that, for example, access to absentee ballots may be curtailed, as long as the voter can still vote in person. But, if an advantageous means of voting is curtailed as to one group more than it is to another, what difference does it make that there may be other methods of voting? If all methods of voting made voting equally accessible, there would have to be only one method. Obviously, expanding methods of voting makes it more likely that people will vote. And, equally obviously, contracting them makes it less likely that people will vote. Contracting them in a way that affects some racial or ethnic groups more than others is inconsistent with the language and Congressional intent of Section 2. States should not be led to believe that they have carte blanche to target specific voting practices, when the effect is discriminatory, and try to justify it by the availability of other means of voting.

7. Justification for discriminatory practices must be based on reality

And, fifth, in explaining the state justification factor, the Court seemed to open the door to a state's justifying virtually any discriminatory action simply by parroting the words "fraud prevention." Again, while the Court did not say so explicitly, the fear is that lower courts—and, worse, state legislatures—may so interpret the Court's opinion.

The incongruity of the Court's approach is seen in comparing the hundreds of thousands of voters who were potentially deprived from voting under Texas's prior Photo ID law, with the infinitesimally small number of persons even accused of fraudulently voting. A state's choice to prevent non-existent fraud at the expense of thousands of votes, disproportionately of person of color, is not legitimate. Again, permitting such choice, is inconsistent with the language of Section 2 and Congressional intent.

8. The Senate Factors are relevant

The Brnovich majority went on to raise questions as to whether the Senate Factors are relevant to a Section 2 vote denial case, implying they are not, but leaving ambiguous precisely what the Court means as to how the few Factors the Court deems potentially relevant fit in, other than superficially.

Although Gingles involved vote dilution, the decision addressed Section 2 writ large, recognizing that "Section 2 prohibits all forms of voting discrimination, not just vote dilution." Further, Gingles recognized the applicability of the various Senate Factors would naturally turn on the type of Section 2 claim at issue. The Gingles Court's state-

ment that the Senate Factors will "often be pertinent to certain types of § 2 violations," such as dilution, cannot be reconciled with a conclusion that the Factors "only" inform one specific type of Section 2 claim.

D. The Growing Present Need

As with the need for the resuscitation of Section 5, recent events reflect the significant present-day need for an immediate response to Brnovich. As detailed throughout this testimony, for example, the recently enacted Georgia voter suppression law, SB 202 increases the burdens for virtually every aspect of voting from voting by mail through voting in person. At least some aspects of SB 202 appear to be clearly retrogressive and probably would not have been proposed in the first place were it not for the decision in Shelby County. The effect of the Brnovich decision on the challenge to SB 202 remains to be seen, but already defendants have moved to dismiss the complaints on the basis of Brnovich. Although, we strongly believe that the complaints as drafted fully and adequately plead a "results" claim under Section 2 even post-Brnovich, the very making of these arguments demonstrates how those who support the erection of barriers to vote intend on using that opinion.

Georgia, of course, is not the only state that is considering or has passed laws with new barriers to voting that disproportionately affect voters of color. Florida did so with SB 90, a law that—similar to Georgia's—imposes new and unnecessary restrictions on absentee ballots, the use of drop-boxes, and line-warming. And Texas appears poised at this writing to pass an omnibus voting bill that would, among other things, empower partisan poll watchers with virtually unfettered access in polling places, while at the same time tying the hands of election officials to stop the poll watchers from engaging in intimidating conduct. Texas has a well-documented history of voter intimidation by poll watchers that has disproportionately affected voters of color. The courts have acknowledged this pattern before—in 2014, a federal district court described this very issue: "Minorities continue to have to overcome fear and intimidation when they vote. . . . [T]here are still Anglos at the polls who demand that minority voters identify themselves, telling them that if they have ever gone to jail, they will go to prison if they vote. Additionally, there are poll watchers who dress in law enforcement-style clothing for an intimidating effect to which voters of color are often the target."

As with Georgia's SB 202, some of these provisions might have been stopped by an effective Section 5 and challenges to some of them may be hampered by the effect of the Brnovich decision. The bottom line, however, is that recent events have only underscored the need for a robust Voting Rights Act.

E. The Appropriate Congressional Response

The impact of Brnovich has yet to be measured, but common sense and history instruct us that those who wish to target voters of color will undoubtedly feel emboldened by a decision that can be read as making it more difficult for plaintiffs to prove a Section 2 violation, giving state legislatures a "Get Out of Jail" card to pass voter suppressive legislation and justify it simply by claiming "voter fraud." Although we firmly believe that the courts should not apply Brnovich in such a manner, the threat is there. Continued commitment to the core purpose of the Voting Rights Act should not be left in the uncertainty created by the ambiguous and problematic language of Brnovich. We identify here a number of issues for consideration and would be pleased to work with the Committee on legislative text.:

Clarify that the "totality of the circumstances" to support a Section 2 violation entails an intensely local appraisal.

Clarify that "totality of the circumstances" may include any or all of the factors deemed relevant by Gingles, including the Senate Factors, and that no factors are exclusively pertinent to "results" claims or "dilution" claims. These include Factors 1 and 5, which are important, not for the back-of-the-hand reading given them by Justice Alito, but because they go to the core issue of the interaction between historic socioeconomic discrimination and the voting practice in question.

Clarify that, in determining the extent to which a challenged voting rule burdens minority voters, the absolute number or the percent of voters affected or the presence of non-minority voters in the affected area will not be dispositive.

Clarify that in determining whether the policy underlying the use of a voting rule is tenuous—one of the Senate factors—the court should consider whether the voting rule in question was actually designed to advance and in fact materially advances a valid and substantiated state interest. That preventing voter fraud may be a valid state interest should not lead to a determination that any voting practice alleged to have been enacted to protect fraud is valid, particularly if the instances of voter fraud are rare, if not virtually non-existent, and the means chosen to combat the alleged fraud scarcely further that aim, and, further, do so at the expense of preventing eligible voters from voting.

Clarify that a discriminatory law cannot be justified on the basis that it was a standard practice at a particular date, such as 1982, or is widespread today, but must be judged solely on the totality of the circumstances in the particular jurisdiction, as viewed at the time the action under Section 2 is brought.

Clarify that the availability of other methods of voting not impacted by the voting rule at issue cannot weigh against finding a violation.

Put an end to any doubt, as raised by the concurring opinion of Justices Gorsuch and Thomas in Brnovich, that there is a private cause of action for a Section 2 violation, as every Circuit Court of Appeals has held.

I am not in favor of employing a burden-shifting approach because I believe that Section 2 vote denial claims should be restored to their pre-Brnovich state and burden-shifting has not been part of the Section 2 inquiry. In addition, burden-shifting places the state's interest at the center of the inquiry in the second and third prongs in the three-prong analysis, whereas the focus should be on the impact on voters.

III. Conclusion

The eight years since the Supreme Court's decision in Shelby County v. Holder have left voters of color the most vulnerable to voting discrimination they have been in decades. The record since the Shelby County decision demonstrates what voting rights advocates feared—that without Section 5, voting discrimination would increase substantially. The Brnovich decision—by creating new hurdles for Section 2 claimants to overcome—raises the stakes appreciably. Congress must act.

TESTIMONY OF PROFESSOR BERNARD L. FRAGA, EMORY UNIVERSITY, ATLANTA, GA, BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES OF THE U.S. HOUSE COMMITTEE ON THE JUDICIARY

THE NEED TO ENHANCE THE VOTING RIGHTS ACT: PRACTICE—BASED COVERAGE JULY 27, 2021

Chair Cohen, Ranking Member Johnson, and distinguished members of the committee, it is an honor to testify before you today. My name is Bernard L. Fraga, and I am an associate professor of political science, with tenure, at Emory University in Atlanta, Georgia. My research focuses on the quantitative analysis of elections in the United States, with particular attention to the causes and consequences of disparities in voter turnout. I received my B.A. in Political Science and Linguistics from Stanford University and my Ph.D. in Government and Social Policy from Harvard University.

The right to vote is the cornerstone of representative democracy. In the majority opinion for *Reynolds v. Sims*, Chief Justice Earl Warren noted that as “the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.” The same year *Reynolds v. Sims* was argued, however, John Lewis was arrested for carrying a “One Man, One Vote” sign in Selma, Alabama and Fannie Lou Hamer was beaten nearly to death by state troopers in Montgomery County, Mississippi for her voting rights activism. Less than a week after Chief Justice Warren read the *Reynolds v. Sims* decision, Freedom Summer activists James Chaney, Andrew Goodman, and Michael Schwerner were murdered while trying to organize a voter registration drive. Thus, at the same time voting can be recognized as central to our system of government, the vote can be denied in places where resistance to changing the existing power structure is entrenched and unyielding.

It took federal action through the Voting Rights Act of 1965 to change this pattern. However, a powerful tool of the act for combatting efforts to restrict the right to vote was rendered inactive after *Shelby County v. Holder*. In that decision, the preclearance provisions of the Voting Rights Act, which mandated federal oversight for election law changes in a set of states and counties, were ruled inoperable as the coverage formula was deemed unconstitutional. Noting that while “voting discrimination still exists; no one doubts that,” Chief Justice Roberts called on Congress to “draft another formula based on current conditions.”

In the attached report, I outline a flexible, forward-looking formula for practice-based preclearance that can secure our rights far into the future. Drawing on a database of over 3,500 legal cases or proceedings related to minority voting rights, along with historical, theoretical, and empirical evidence regarding where voting rights violations are likely to occur, I show a strong relationship between the racial/ethnic composition of a state or county and the likelihood that that the jurisdiction will see a violation. This pattern appears across racial/ethnic minority groups and over time. Specifically, I find the following:

1. Historical evidence indicates a clear relationship between attempts to restrict the franchise and the size of the racial/ethnic minority population in the jurisdiction. In states and counties with a larger minority population, efforts to limit the participation of racial/ethnic minority citizens are substantial and persist absent federal intervention to protect the right to vote. (Pgs. 2-7 of the report)

2. In recent years, voting rights-related litigation is vastly more common in states and counties with sizeable racial/ethnic minority populations. This pattern persists even when isolating the analysis to litigation resulting in successful prosecution of a voting rights case. (Pgs. 8-19 of the report)

3. Combined with a practice-based approach to preclearance, a population-limited trigger for preclearance coverage can ensure an appropriate balance between protecting voting rights and creating additional requirements for election officials. The threshold that best balances this tradeoff is 20%, such that practice-based preclearance would be required for states or counties where at least two racial/ethnic groups each make up at least 20% of the jurisdiction's population. (Pgs. 19-23 of the report)

I invite members of the committee to read the attached report and the conclusions therein, and ask that the report be officially entered into the record. In closing, I urge the committee to reinvigorate the Voting Rights Act and renew the promise of voting rights for all Americans. Indeed, no single action taken by the members of this Congress may be more consequential. It is up to you, and the other members of the House and Senate, to heed the call.

A POPULATION-LIMITED TRIGGER FOR PRACTICE-BASED PRECLEARANCE UNDER THE VOTING RIGHTS ACT

(By Bernard L. Fraga, Ph.D., Associate Professor of Political Science, Emory University, Atlanta, GA)

I. INTRODUCTION

In 2013, the *Shelby v. Holder* decision invalidated the key formula used to determine which jurisdictions would be subject to the Section 5 “preclearance” provisions of the Voting Rights Act. Writing for the 5-4 majority, Chief Justice Roberts stated “a statute’s current burdens must be justified by current needs, and any disparate geographic coverage must be sufficiently related to the problem that it targets. The coverage formula met that test in 1965, but no longer does so.” Instead, the Court indicates “Congress may draft another formula based on current conditions . . . Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.”

In this report, I outline the rationale for a current population-limited trigger for additional scrutiny of election practices that could be used to violate the voting rights of Black, Hispanic, Asian American, Pacific Islander, and American Indian/Alaska Native (AIAN) populations. I first demonstrate that there is strong historical, theoretical, and empirical evidence for a relationship between the share of the electorate that is minority and potential violations of minority voting rights. Using a detailed database of recent voting rights act-related litigation, I then show that in counties and states where two racial/ethnic groups separately compose at least 20% of the voting-age population, “current conditions” justify additional scrutiny of covered election practices via the Voting Rights Act.

By constructing a formula for coverage of specific election practices based on contemporary demographics, I provide a flexible trigger that both meets current needs and can adapt to the changing conditions of the future. Combined with a cogent analysis of which election practices should be subject to additional scrutiny, and any further triggers based on established, recent discriminatory practices, this formula could be one part of a strengthened Voting Rights Act that protects the voting rights of all Americans.

II. HISTORICAL AND THEORETICAL BASIS FOR A POPULATION-LIMITED TRIGGER

In this section, I discuss why a population-limited trigger is justifiable based on the extant record of where minority voting rights violations have occurred. I first begin by outlining the history of federal oversight to protect racial/ethnic minority voting rights. Then, drawing on theoretical understandings of elections and extant empirical evidence, I discuss the circumstances where federal oversight may be most necessary to safeguard voting rights.

a. Reconstruction, Jim Crow, and the Role of Federal Oversight in Ensuring Minority Voting Rights

For most of U.S. history, the voting rights of racial/ethnic minority groups were curtailed by statutes and laws restricting access to the franchise. At the start of the Civil War, de jure exclusion of the African-American population was nearly complete, as a handful of northern states permitted African Americans to vote by law, but whether enslaved or free, the much larger Black population of the South was excluded from the franchise. Native Americans on Indian lands and Asian Americans were de jure barred from voting as they were ineligible for citizenship or naturalization. Latinos held tenuous, but at times electorally relevant voting rights, especially in the former Mexican territories where nearly all Latinos resided prior to 1900.

After the Civil War, the historical record of minority voting rights indicates periods of expansion, contraction, and then expansion that directly coincides with federal action to prevent states from de jure or de facto racial/ethnic discrimination in voting. The first notable expansion of voting rights to African-Americans occurred with the Reconstruction Acts of 1867 and 1868, which granted the vote to formerly enslaved Black men and placed voter registration under the control of Union (Northern) military commanders. Over 700,000 African Americans registered to vote, outnumbering White registrants in multiple Southern states and ensuring election of a Congress and state legislatures conducive to the 14th and 15th Amendments. However, the 14th Amendment’s de facto application to African-Americans alone meant that most Native Americans, Latinos, and Asian Americans remained barred from voting.

White resistance to enfranchisement of Black men was immediate, severe, and concentrated in the South where the relatively high proportion of Black voters relative to white voters meant that Black men could exert significant influence on election outcomes. The “Redeemer” movement, as it was called, viewed ending Black suffrage as the proximate goal to regain political power for former Confederates and sympathizers, resorting first to violence and then de facto disenfranchising policies implemented by local election officials. These policies, including poll taxes, literacy tests, and residency requirements, were administered in a racially discriminatory manner but were ruled as beyond federal oversight by the Supreme Court in *U.S. v. Reese*. The removal of remaining federal troops from the South in 1877, and Congress’s failure to pass legislation designed to counter *U.S. v. Reese*, directly resulted in heavily-Black Southern states passing new constitutions between 1890 and 1910 with the specific, intentional goal of disenfranchising African Americans.

The second period of expansion again indicates the important role of federal oversight in places where racial/ethnic minorities are a significant share of the population. Through Supreme Court rulings outlawing Grandfather Clauses (1915) and the final iteration of the White Primary (1944), heavily-Black

and heavily-Latino (in particular, Texas) states of the South were no longer able to de jure prevent African-Americans and Latinos from voting statewide. However, the poll tax and literacy test were still administered in a discriminatory fashion by local officials in heavily-Black and Latino counties, just as resistance to ending the White Primary was strongest in heavily-Black parts of Southern states. Indeed, by the 1950s, Black voter registration rates were relatively high in Northern cities and rapidly increasing Southern counties with smaller Black concentrations. In ending the ban on naturalization for remaining Asian and Latin American origin groups, the 1952 McCarran-Walter Act opened the door to naturalization (and voting rights) for any legal resident of the United States. Thus, by the mid-1950s federal action had eliminated the explicit racially discriminatory barriers to voting outside of heavily-minority counties.

Stronger federal action was necessary to ensure voting rights in places with a large share of racial/ethnic minority citizens. The Civil Rights Acts of 1957, 1960, and 1964 sought to eliminate discriminatory voter registration practices in the South by targeting the methods used by local election officials to curb Black voter registration. Yet resistance continued, culminating in the violent, “Bloody Sunday” attacks by local officials in heavily-Black Selma, Alabama. This spurred passage of the Voting Rights Act of 1965, mandating two key forms of federal oversight for jurisdictions with a recent history of discriminatory election practices: federal voting registrars and a requirement that election law changes are “precleared” by federal officials prior to implementation. While not explicitly defining states and counties subject to federal supervision on the basis of population size, each of the 7 states covered in whole or in part by the coverage formula outlined in Section 4 were at least 20% African-American and were the top 7 states in Black population percentage as of the 1970 Census.

The Voting Rights Act of 1965 was amended and expanded to include American Indian/Alaska Native, Hispanic, and Asian American/Pacific Islander populations through amendments in 1970 and 1975. Mirroring the situation for African-Americans in the Deep South, discrimination was most severe in states and localities with relatively large numbers of Latino and Native American voters. For instance, testimony in favor of the 1975 VRA Amendments by Latino witnesses focused on voting rights violations in counties in Texas and California with large shares of Latino citizens. Disenfranchisement of Native American voters appeared in states and counties with tribal lands and reservations concentrating potential Native American voting strength.

b. Minority Population Size is Associated with Attempts to Restrict Voting Rights

The history of minority voting rights briefly outlined above indicates a generalizable relationship between minority population size and attempts to restrict voting rights. While at various times limitations on the franchise were quite widespread (and impeded participation for non racial/ethnic minority groups as well), the pockets of most determined efforts to restrict minority voting rights were areas of the country where racial/ethnic groups made up a larger than average share of the population. Attempts to counter continued disenfranchisement through federal intervention thus also focused on these areas, during both the Reconstruction Era and Civil Rights Era. The creation, preservation, and reinstatement of minority voting rights across the United States thus hinges on the actions of the federal government.

This historical evidence aligns with theoretical expectations about where incentives to disenfranchise should be most acute. In an often-quoted section of the canonical text *Southern Politics in State and Nation* (1949), political scientist V.O. Key noted that “in grand outline the politics of the South revolves around the position of the Negro,” and due to the substantial size of the Black population in the historic “black belt” region, “the whites of the black belt have the most pressing and most intimate concern with the maintenance of the established pattern of racial and economic relations.” By the 1960s, disenfranchisement came with significant costs to Southern states and counties, including threat of sustained protests and federal action; in theory, this cost should be borne only when white dominance on election day would be threatened with Black enfranchisement. Indeed, empirical evidence indicates that the immediate impact of the Voting Rights Act of 1965 on Black enfranchisement was greatest in the heavily-Black counties of the Deep South, precisely where electoral incentives to disenfranchise were strongest. Thus, while the legacy of slavery and Jim Crow may be associated with efforts to disenfranchise, the key differentiator within the South was minority population size. Where minority groups could influence politics, even if only as significant members of coalitions with White voters, efforts to restrict voting rights followed.

These incentives remain most powerful in states and counties with significant racial/ethnic minority populations today. Just as in the past, where a racial/ethnic group is a larger share of the population, they will be more likely to have substantial influence on election outcomes. Different from past trends, and speaking to the success of the Voting Rights Act in eliminating the most egregious forms of disenfranchisement, campaigns, candidates, and voters themselves now seek to leverage the power that large and/or growing racial/ethnic minority populations have when given the opportunity to vote. Indeed, voter turnout for racial/ethnic minority groups is now significantly higher in states and counties where minority citizens make up a larger than average share of the population. Officeseeking by candidates from minority groups is also far more common in heavily-minority states and legislative districts, as are opposing efforts to dilute minority voting strength via manipulation of electoral systems and district boundaries.

Further discussion of recent trends in potential voting rights violations is provided in Section III of this report, but in short, the relationship between a state or county’s minority population size and efforts to disenfranchise minority voters has a solid historical, theoretical, and empirical basis. Thus, there is a clear need for federal oversight to protect minority voting rights in jurisdictions with large shares of minority voters today, and to provide a flexible coverage formula that can account for growing racial/ethnic minority populations in the future. This need is most acute in the protection of Latino and Asian American/Pacific Islander voting rights, whose population growth often occurs in areas that did not have a history of repressing African-American voting rights.

III. DETERMINING AN APPROPRIATE POPULATION-LIMITED TRIGGER

If a population size-based trigger is to be used to determine which jurisdictions warrant additional scrutiny in the application of certain election practices, what population threshold or thresholds should trigger coverage? Again we must turn to the patterns of past voting rights violations, but be cog-

nizant of the need to “draft another formula based on current conditions.” In this section, I demonstrate that the pattern of potential and actual VRA violations from 1982 to the present indicates that a racial/ethnic group population size threshold of 20% is justifiable, that such a formula would provide flexibility to address both current and future needs as racial/ethnic group populations change over time, and that specifying two racial/ethnic groups must each meet the threshold appropriately considers where policies could reasonably impede the voting rights of racial/ethnic minority groups.

a. Tracking Potential Violations of Minority Voting Rights

To track previous potential violations of minority voting rights, I rely on a database constructed by Dr. J. Morgan Kousser. Dr. Kousser is professor emeritus of history and social science at the California Institute of Technology, and a leading expert on voting rights. Dr. Kousser’s research, and specifically a previous version of the database I use, were discussed by Dr. Kousser in testimony to the Subcommittee on the Constitution, Civil Rights and Civil Liberties of the U.S. House Committee on the Judiciary in October 2019. In that testimony, Dr. Kousser remarked that his effort to “create a database of all voting rights actions under any federal or state statutes or constitutional provisions” was designed to allow “evaluations of the adequacy of past and potential coverage schemes if Congress wishes to replace Section 4 of the VRA.” It is in this capacity that I use his database.

Dr. Kousser’s database has approximately 3,540 legal cases or proceedings related to minority voting rights from 1965 to 2018. Of these cases, 2,510 focus on potential violations of Black voting rights, 801 with potential violations of Hispanic/Latino voting rights, 32 with potential violations of Asian American voting rights, and 135 with American Indian or Alaska Native voting rights. Table 1 shows the number of cases by group and by decade from 1965 to 2018, the most recent year with comprehensive data in Dr. Kousser’s database. In Table 1 we see that the total number of cases per decade peaked in the 1980s and 1990s. Cases where Black and Native American voters were the primary groups of interest peaked in the 1980s, while cases where Hispanic or Asian American citizens were principal groups peaked in the 1990s.

Table 1 also provides separate statistics for cases involving counties or towns subject to the Voting Rights Act Section 5 preclearance provisions from 1965 to 2013. A similar pattern of cases by decade and by race appears for these jurisdictions in isolation, as prior to the invalidation of Section 5 coverage in *Shelby v. Holder* the vast majority of cases were in preclearance-covered jurisdictions. Of course, the nature of Section 5 coverage pre-*Shelby* meant that the strongest predictor of a lawsuit or other action being taken on behalf of minority plaintiffs was whether or not the county was subject to preclearance. However, in every decade after the 1970s at least 100 cases were filed outside of Section 5 preclearance jurisdictions.

In the more detailed analyses below, I focus on the period from 1982 forward, as the 1982 amendments to the Voting Rights Act and Gingles decision clarified the intent of the VRA of 1965 with an eye to policies with discriminatory effect, not just discriminatory intent. The post-1982 period is also when the vast majority of “successful” voting rights actions occurred, and the bulk of potential violations of minority voting rights overall, constituting 74% of cases in all jurisdictions and 70% of cases in jurisdictions covered by Section 5 from 1965–2013. Finally,

I examine all cases of potential minority voting rights violations, not just cases that resulted in an outcome favorable to minority plaintiffs. Given the different legal standards used to make judgements about vote dilution versus vote denial, Section 5 versus Section 2 claims, and voting rights violations more broadly over time, the more complete picture of where plaintiffs indicated a voting rights violation may have occurred is one appropriate metric for determining where, e.g., U.S. Department of Justice resources would need to be deployed.

Finally, this report focuses on counties and states as units of analysis, as Dr. Kousser's database is organized at the state and county level. American Indian lands are also important political units from the perspective of American Indian voting rights, and a key part of both the Voting Rights Act Section 203 language assistance formula and the proposed coverage formula. However, violations of voting rights occurring in or for those with residence in Indian reservations are generally directed to the state or county whose territory overlaps with those reservations.

b. Geographic Pattern of Potential Voting Rights Violations

Compiling Dr. Kousser's data, we see wide dispersion in potential voting rights violations when examining state-level suits and legal actions. Figure 1 shows states with a statewide potential voting rights violation during the period from 1982–2018. Color indicates which racial/ethnic group's voting rights were most clearly impacted in the first alleged statewide violation. Broadly speaking, the distribution of first cases by race/ethnicity often coincides with which groups make up the largest share of the racial/ethnic minority population in each state. In the Deep South, African-American plaintiffs were the first to allege a statewide violation. In most of the Southwest, Latino plaintiffs were first. In Alaska and Arizona, both of which came under Section 5 preclearance as a result of historical discrimination against Alaska Native and American Indian populations, respectively, these groups were first to allege a statewide violation of their voting rights.

Figure 2 documents which counties that have ever had a violation or potential violation via litigation. Again, this does not include the DOJ's More Information Request process, which may mask additional potential violations that were averted in Section 5 covered counties. As with the statewide map in Figure 1, Figure 2 shows only counties with potential voting rights violations occurring between 1982 and 2018. Shading indicates the first group to bring a suit at the county level, and counties in white did not have a county-level suit. Again, we see a pattern broadly consistent with the known distribution of racial/ethnic groups in the United States, though the map makes it more clear that potential voting rights violations are concentrated in the Deep South, heavily-minority urban counties of the North and Midwest, and some heavily—Latino and Native American areas of the Southwest and West.

c. Data on Racial/Ethnic Group Population Size

Figures 1 and 2 are suggestive of a pattern of recent potential voting rights violations similar to the historical record I discuss in Section II of this report. To provide more firm evidence on this dimension, I rely on data from the U.S. Census Bureau that is contemporaneous to each potential violation in Dr. Kousser's database. Specifically, I rely on yearly intercensal estimates of the voting-age population by race/ethnicity from 1982 to the present at both the state and county level. Yearly intercensal estimates

for racial groups other than Whites and African-Americans are not available at the county level until 1990. Thus, for years from 1982–1990, I interpolated the 1980 to 1990 state or county-level change in the voting-age population by race and ethnicity, providing trends in the non-Hispanic White, Black, Hispanic, and Asian American/Pacific islander voting-age populations. For years from 2010–2018, I rely on data from the U.S. Census Bureau's Population Estimates Program (PEP), which is broadly similar to the Intercensal estimates.

As the above indicates, one advantage of a coverage trigger based on racial/ethnic population size is the fact that all data necessary to enact the formula is already collected, compiled, and analyzed by the U.S. Census Bureau. A determinations file, similar to that provided every five years for establishing coverage under the population-based formula for language assistance in Section 203 of the Voting Rights Act, could be constructed by the Census Bureau and provided to the Department of Justice for publication in the Federal Register.

d. Correlating Potential Violations with Population Size

A descriptive analysis of the relationship between racial/ethnic minority group population share and potential voting rights violations confirms the patterns suggested by Figures 1 and 2, and validates the historical and theoretical foundations for a population-limited trigger for coverage as outlined in Section II of this report.

Dr. Kousser's database indicates that a majority of states have had at least one potential minority voting rights violation since 1982. In the 12 states that have not, no single racial/ethnic group was 10% or more of the state's voting-age population at any point in time between 1982 and 2018. However, in every state where a single racial/ethnic group has been at least 10% of the state's voting-age population, at least one suit or action has been brought at the statewide level. On average, the first statewide potential violation in a state occurred when the group in question was 12% of the voting-age population. For states that have never had a statewide violation, the average size of the single largest racial/ethnic minority group is only 5.2%.

A county-level analysis provides additional insights. As with states, counties that have had a violation or potential violation of minority voting rights since 1982 had larger minority populations at the time of their first potential violation, on average. Since 1982, at least 804 counties have had at least one potential violation of minority voting rights occur in their jurisdiction. 61% of counties with violations had their first violations happen when a single racial/ethnic minority group was 20% or more of the jurisdiction voting-age population. Furthermore, only 321 counties where a single racial/ethnic minority group makes up more than 20% of the population have not had a voting rights-related lawsuit, approximately one-third of the counties with a minority population reaching this threshold.

Table 2 also indicates that the likelihood of a violation increases sharply as the county population shifts from having a single racial/ethnic group making up less than 10% of the county's voting-age population, to 10–20%, to 20–30%. Beyond the 20–30% category, increases in the percentage of counties with a violation are significantly smaller. Indeed, once a single non-white racial/ethnic group makes up a majority of the county (the final row in Table 2), the likelihood of a voting rights violation decreases relative to jurisdictions where a single racial/ethnic group is nearly a majority of the voting-age popu-

lation, dropping to roughly the rate we see in the 20–30% category.

Another way of visualizing this pattern is presented in Figure 3. Figure 3 plots the share of counties with a potential violation as a function of the size of the racial/ethnic group at the time the violation occurred (or the size of the largest racial/ethnic group in the county today, if no potential violation occurred between 1982 and 2018). The blue line is the moving average of the share of counties with a potential violation (left side of chart) given the racial/ethnic group size specified (bottom of the chart). The red line in the middle of the chart denotes the point where a county has even (50% yes, 50% no) odds of a potential violation.

Figure 3 again shows a very strong relationship between the size of the racial/ethnic minority population and the likelihood of a potential voting rights violation. We see a roughly linear increase in the likelihood of a violation as the population approaches roughly 20%, with diminishing returns to further increases in single minority group population size before the probability begins to decrease after 50% minority. Furthermore, the point of equal likelihood of having a potential violation versus not occurs when the racial/ethnic group whose rights may have been violated is approximately 20% of the overall voting-age population in the jurisdiction. Beyond 20%, counties have better-than-even chances of having had a potential violation, until roughly 75% when the likelihood of a violation drops below 50–50 once again.

A similar pattern is present for counties with successful cases, where courts determined (or appeared set to determine according to defendants, as they were settled out of court) that a violation of a group's voting rights had occurred. Figure 4 shows these patterns at the county level. In Figure 4, we see almost exactly the same rate of successful cases as a function of minority group population share as we do for the number of cases overall (successful or not). The chance of a successful voting rights case is better than 50–50 when a minority group is about 25% of the voting-age population in a county. Of course, not all voting rights-related actions result in an outcome in favor of plaintiffs. However, Figure 4's close match with Figure 3 indicates that the relationship between voting rights suits and minority group size is not attributable to an increased number of unsuccessful cases brought by minority plaintiffs in heavily-minority counties.

e. Ensuring equal treatment of counties based on probability of a violation

The analyses above demonstrate that once a racial/ethnic minority group grows large enough to make up 20% of a county's voting-age population, the probability of at least one potential voting rights-related legal action reaches 50%. Given the nature of the election practices that would be subject to preclearance, in that these are commonly used practices that are often tarnished by those seeking to discriminate against minority voters, this threshold may be an appropriate benchmark for determining where additional scrutiny is warranted. However, it is important to consider how various population thresholds balance the need to protect voting rights with the potential to add an additional layer of review of state and county election practices.

In any process where some jurisdictions are going to be subject to additional scrutiny, while others are subject to conventional review, there will be instances where after the fact we see that the additional scrutiny did not result in finding a violation or the conventional review revealed a violation on its own. Therefore while the goal is

to minimize such instances, it is not realistic to eliminate them entirely. With this in mind, Table 3 examines the suitability of various single-group relative population size thresholds in terms of the recent history of potential voting rights violations in counties nationwide. Under the population thresholds listed in the first column of Table 3, a county would gain practice-based preclearance if it had a single non-white racial/ethnic group's population making up the indicated percentage of the voting-age population in the county. The "False Negative Rate", also called Type I error, indicates the percent of counties that would not be covered via the indicated population threshold formula, but did have a potential violation. The false negative rates in Table 3 indicate that with all population thresholds higher than 20%, more than half of counties having potential violations would not have triggered practice-based preclearance based on the population at the time of their first potential violation.

The "False Positive Rate," also called Type II error, indicates the percent of counties that are covered via the listed population threshold-based trigger, but have never had a potential violation in Dr. Kousser's database. While generally lower than the false negative rate, we do see that at both the high end of the potential thresholds and low end of potential thresholds, a larger share of jurisdictions would be subject to preclearance despite never having a voting rights suit filed against the jurisdiction.

The final column of Table 3, titled "Overall Error Rate" aggregates Type I and Type II error and shows the percent of counties nationwide that are either incorrectly excluded (not covered despite having had a violation) or incorrectly included (covered despite never having a violation). While differences between coverage thresholds are relatively small, we do see that the 20% threshold for coverage minimizes the overall number of counties with violations that are missed and covered counties that have not had suits filed against them in the past.

At the highest racial/ethnic minority population percentages, Figure 3 shows that the rate of potential violations decreases drastically. Table 3 also indicates that the number of false positives begins to increase with thresholds beyond 30%, as in recent decades heavily-minority counties have not had potential voting rights violations despite many of these counties being subject to preclearance under Section 5 of the Voting Rights Act. From a theoretical perspective, this is logical: in such places contemporary methods used to violate minority voting rights are unlikely to change the underlying dynamic of which racial/ethnic group holds power, so attempts to disenfranchise are rare. Therefore, in places where a single minority group is more than 80% of the population, and therefore (numerical) minority racial/ethnic group is less than 20%, disenfranchisement is similarly unlikely. Crafting a two-group formula as such also accords with the reality that 15th Amendment protections apply to all Americans, not just members of specific racial/ethnic minority groups.

Table 4 documents the effect of using a two-group threshold on false negative, false positive, and overall error rates. Error rates are little changed from Table 3, as today, few counties have a single racial/ethnic minority group at or exceeding 80% of the county's population. However, the small number of counties that do have such a high minority population have no recent history of voting rights violations, and with future demographic shifts more counties will likely fall into this category in the future. Requiring that two racial/ethnic groups are at least 20% of the voting-age population in a juris-

diction thus both recognizes the "current conditions" cited by C.J. Roberts in the *Shelby* decision, and acknowledges how our country will "change" in the future.

The 20% threshold proposed above also serves to allocate legal resources as efficiently as possible. Due to the nature of the election procedures that would be subject to preclearance, where policies may be facially race-neutral but used to discriminate under certain circumstances, it may be useful to concentrate additional effort on places where discriminatory effect is more likely to occur. Counties unlikely to have a violation may not need extra scrutiny for these commonplace practices. Of course, jurisdictions under the threshold could still be subject to litigation under Section 2 of the Voting Rights Act, as they are today. These jurisdictions may also fall into coverage as their racial/ethnic minority population grows.

IV. CONCLUSION

For over 150 years, the federal government has played a key role in preserving the voting rights of racial/ethnic minorities. After the Civil War, the erosion of minority voting rights was most severe in states of the former Confederacy with large African-American populations; the Voting Rights Act of 1965 targeted these states and counties and secured the right to vote for all Americans. In the words of C.J. Roberts, "there is no denying that, due to the Voting Rights Act, our Nation has made great strides," but the changing demographic and political profile of the country persuaded the Court to call for a formula based on "current conditions" of racial discrimination in voting that "no one doubts" still exist.

In this report, I provided the rationale for one such formula. Tracking thousands of voting rights-related judicial actions in recent decades, and buttressed by historical, theoretical, and empirical evidence regarding where voting rights violations are likely to occur, I show a strong relationship between the racial/ethnic composition of a state or jurisdiction and the likelihood that the jurisdiction will see a violation of racial/ethnic minority voting rights. Evaluating tradeoffs between various population size-based thresholds, I also demonstrate that one threshold in particular, 20%, ensures fairness in which jurisdictions are subject to the added scrutiny of a tailored preclearance provision.

The Voting Rights Act of 1965's special provisions were a key tool in the federal government's arsenal to ensure all Americans could participate in the electoral process. A flexible, forward-looking formula will ensure that the Act can continue to secure our rights far into the future. No other action of the current Congress may be more consequential than the reinvigoration of this commitment to the American people.

AUGUST 23, 2021.

Please Support H.R. 4, John Lewis Voting Rights Advancement Act

DEAR REPRESENTATIVE: On behalf of The Leadership Conference on Civil and Human Rights, a coalition of more than 220 national organizations committed to promoting and protecting the civil and human rights of all persons in the United States, and the 96 undersigned organizations, we write in strong support of H.R. 4, the John Lewis Voting Rights Advancement Act.

In 1965, Congress passed the Voting Rights Act to outlaw racial discrimination in voting, and it became our nation's most successful and consequential civil rights law. Previously, many states barred Black voters from participating in the political system through literacy tests, poll taxes, voter intimidation, and violence. By outlawing the

tests and devices that prevented people of color from voting, the Voting Rights Act and its prophylactic preclearance formula put teeth into the 15th Amendment's guarantee that no citizen can be denied the right to vote because of the color of their skin.

Only 15 years ago, Congress reauthorized the Voting Rights Act for the fourth time with sweeping bipartisan support. The House of Representatives reauthorized the legislation by a 390-33 vote and the Senate passed it unanimously, 98-0. Given the importance of the Voting Rights Act, Congress undertook that reauthorization with care and deliberation—holding 21 hearings, hearing from more than 90 witnesses, and compiling a record of more than 15,000 pages of evidence of continuing racial discrimination in voting.

SHELBY COUNTY V. HOLDER

In 2013, the U.S. Supreme Court's ruling in *Shelby County v. Holder* eviscerated the most powerful provision of the Voting Rights Act: the Section 5 preclearance system. This provision applied to nine states and localities in another six states. These jurisdictions were required to obtain preclearance from the Justice Department or the U.S. District Court for the District of Columbia before implementing any change in a voting practice or procedure.

Section 5 was immensely successful in blocking proposed voting restrictions in states and localities with histories of racial discrimination. It also ensured that changes to voting rules were public, transparent, and evaluated to protect voters against discrimination based on race and language. But, in *Shelby County*, Chief Justice John Roberts on behalf of the majority, declared that "Our country has changed." The Court held that the formula identifying jurisdictions subject to preclearance was decades-old and outdated, functionally halting the preclearance requirement. However, the Court invited Congress to assess "current conditions" to update the formula for deciding which jurisdictions should be covered by preclearance.

Despite the best efforts of The Leadership Conference and its many member organizations to protect voting rights and promote civic participation, the impact of eight years of overt and covert anti-voter tactics has had a lasting impact. The Supreme Court's invalidation of the preclearance formula released an immediate and sustained flood of new voting restrictions in formerly covered states. Without the Voting Rights Act's tools to fight the most blatant forms of discrimination, people of color continue to face barriers to exercising their most important civil right, including voter intimidation, felon disenfranchisement laws built on top of a system of mass incarceration, burdensome and costly voter ID requirements, and purges from the voter rolls. States have also cut back early voting opportunities, eliminated same-day voter registration, and shuttered polling places.

The Leadership Conference commissioned several state reports that were prepared by our partner civil rights organizations and allies to document the breadth and depth of recent voting discrimination in ten states across the country. These reports powerfully demonstrate that Congress has an urgent imperative to restore the Voting Rights Act. Individually and collectively, they reveal that voting discrimination after *Shelby County* is pervasive, persistent, and adaptive, sometimes taking new forms but no less pernicious. The reports document voter restrictions passed this year and cite the recent history of voting discrimination in these states. This is the "current discrimination" on which Congress must update the preclearance formula and make several additional amendments to the Voting Rights Act

so voters of color everywhere can fully participate in the political process. All of the state reports have or will be introduced into the congressional record of the August 16, 2021, House Judiciary hearing on Oversight of the Voting Rights Act: Potential Legislative Reforms.

BRNOVICH V. DEMOCRATIC NATIONAL COMMITTEE

Furthermore, just last month, the Supreme Court ruled in *Brnovich v. Democratic National Committee* that two discriminatory Arizona voting laws did not violate Section 2 of the Voting Rights Act. In its opinion in *Brnovich*, the Court disregards the congressional purpose of Section 2, which is to provide a powerful means to combat race discrimination in voting and representation. The majority departs from decades of precedent enforcing Section 2 according to Congress' intent, and it creates new "guideposts" that will ineffectively identify and eradicate discriminatory policies and practices. The decision relies on a limited interpretation of the Voting Rights Act that will make it more difficult to challenge discriminatory voting laws. This decision reiterates the need for Congress to pass the John Lewis Voting Rights Advancement Act to restore the legislative purpose of Section 2.

EVIDENCE OF THE NEED FOR THE JOHN LEWIS VOTING RIGHTS ADVANCEMENT ACT

Discriminatory voting practices are not merely the province of those states with a long history of discrimination. Pernicious practices such as voter purging and restrictive identification requirements—which disproportionately affect voters of color—occur in states throughout the nation. As we commemorated the 56th anniversary of the Voting Rights Act earlier this month, it is important to note that between January 1 and July 14, 2021, at least 18 states enacted 30 new laws that restrict our freedom to vote, and more than 400 bills with restrictive provisions have been introduced in 49 states in the 2021 legislative sessions.

During the 117th Congress, the Senate Committee on the Judiciary, House Committee on the Judiciary, and the Committee on House Administration have held a total of 14 hearings and found significant evidence that barriers to voter participation remain for people of color and language-minority voters.

The Senate Committee on the Judiciary has held three hearings on voting rights:

Restoring the Voting Rights Act after *Brnovich* and Shelby County (July 14, 2021); Supreme Court Fact-Finding and the Distortion of American Democracy (April 27, 2021); Jim Crow 2021: The Latest Assault on the Right to Vote (April 20, 2021).

The House Judiciary Committee, Subcommittee on the Constitution, Civil Rights, and Civil Liberties has held six hearings on voting rights:

Oversight of the Voting Rights Act: Potential Legislative Reforms (August 16, 2021); The Need to Enhance the Voting Rights Act: Practice-Based Coverage (July 27, 2021); The Implications of *Brnovich v. Democratic National Committee* and Potential Legislative Responses (July 16, 2021); The Need to Enhance the Voting Rights Act: Preliminary Injunctions, Bail-in Coverage, Election Observers, and Notice (June 29, 2021); Oversight of the Voting Rights Act: A Continuing Record of Discrimination (May 27, 2021); Oversight of the Voting Rights Act: The Evolving Landscape of Voting Discrimination (April 22, 2021).

The House Administration's Subcommittee on Elections has held five investigatory hearings with 35 witnesses, collected numerous reports and documents, and released a comprehensive report.

Voting In America: A National Perspective On The Right To Vote, Methods Of Election,

Jurisdictional Boundaries, And Redistricting (June 24, 2021); Voting In America: The Potential For Polling Place Quality And Restrictions On Opportunities To Vote To Interfere With Free And Fair Access To The Ballot (June 11, 2021); Voting In America: The Potential For Voter ID Laws, Proof-Of-Citizenship Laws, And Lack Of Multi-Lingual Support To Interfere With Free And Fair Access To The Ballot (May 24, 2021); Voting In America: The Potential For Voter List Purges To Interfere With Free And Fair Access To The Ballot (May 6, 2021); Voting In America: Ensuring Free And Fair Access To The Ballot (April 1, 2021).

THE JOHN LEWIS VOTING RIGHTS ADVANCEMENT ACT RESTORES AND MODERNIZES THE VOTING RIGHTS ACT

The Voting Rights Act of 1965 was passed with leadership from both the Republican and Democratic parties, and the reauthorizations of its enforcement provisions were signed into law each time by Republican presidents: President Nixon in 1970, President Ford in 1975, President Reagan in 1982, and President Bush in 2006. For more than half a century, protecting citizens from racial discrimination in voting has been bipartisan work.

The John Lewis Voting Rights Advancement Act fills a distinct and critical role in protecting the freedom to vote and ensuring elections are safe and accessible. When it comes to our elections, we all want an open and transparent process we can trust, where Americans have equal freedom to vote, whether we live in a small town or big city, or the coasts or the Midwest. Passage of the John Lewis Voting Rights Advancement Act will fulfill part of that promise of a democracy that works for—and includes—us all.

The John Lewis Voting Rights Advancement Act would restore the VRA in the following ways:

The Act would update criteria under the "geographic trigger" for identifying states and localities required to obtain federal review of voting changes before they are implemented.

Under the "practice-based" trigger, every state and locality nationwide that is sufficiently diverse would be required to obtain federal review before enacting specific types of voting changes that are known to be discriminatory in their use to silence the growing political power of voters of color.

The Act would require all states and localities to provide public notice to all voters of certain voting changes.

The Act would address the *Brnovich* decision by clarifying factors that voters of color can use to prove a vote dilution or vote denial claim under Section 2 of the VRA and restoring voters' full ability to challenge racial discrimination in voting in court.

The Act would allow the Department of Justice and voters of color to challenge changes in a voting rule that would make voters of color worse off in terms of their voting rights than the status quo.

The Act would expand authority for courts to "bail-in" jurisdictions to the preclearance process and would update the ability of jurisdictions to "bail-out" of the preclearance process once they demonstrate a record of not harming voters of color.

The Act would grant the Department of Justice authority to compel the production of documents relevant to investigations of potential voting rights violations prior to filing an enforcement action.

The U.S. Attorney General would have authority to request federal observers anywhere there is a serious threat of racial discrimination in voting.

The Act would provide voters with additional protection by easing the standard for

when courts can temporarily block certain types of voting changes while the change is under review in court. This is important because once a voter is discriminated against in an election, it cannot be undone.

CONCLUSION

When President Lyndon Johnson signed the Voting Rights Act of 1965, he declared the law a triumph and said, "Today we strike away the last major shackle of . . . fierce and ancient bonds." But 56 years later, the shackles of white supremacy still restrict the full exercise of our rights and freedom to vote.

For democracy to work for all of us, it must include us all. When certain communities cannot access the ballot and when they are not represented in the ranks of power, our democracy is in peril. The coordinated, anti-democratic campaign to restrict the vote targets the heart of the nation's promise: that every voice and every eligible vote count. Congress must meet the urgency of this moment and pass the John Lewis Voting Rights Advancement Act. This bill will restore the essential provision of the Voting Rights Act that blocks discriminatory voting practices before they go into effect, putting a transparent process in place for protecting the right to vote. It will also restore other provisions to help bring down the barriers erected to silence Black, Brown, Native, young, and new Americans and ensure everyone has a voice in the decisions impacting our lives.

On March 7, 1965, just a few months before President Johnson would sign the Voting Rights Act into law, then 25-year-old John Lewis led more than 600 people across the Edmund Pettus Bridge to demand equal voting rights. State troopers unleashed brutal violence against the marchers. Lewis himself was beaten and bloodied. But he never gave up the fight. For decades, the congressman implored his colleagues in Congress to realize the promise of equal opportunity for all in our democratic process. Before his death, he wrote: "Time is of the essence to preserve the integrity and promises of our democracy." Members of this body must now heed his call with all the force they can muster and support the John Lewis Voting Rights Advancement Act.

Sincerely,

The Leadership Conference on Civil and Human Rights, A. Philip Randolph Institute, ADL (Anti-Defamation League) Advancement Project, National Office, African American Ministers In Action, Alliance for Youth Action, American Association of University Women (AAUW), American Civil Liberties Union, American Federation of State, County and Municipal Employees, American Federation of Teachers, American Humanist Association, American-Arab Anti-Discrimination Committee (ADC), Americans for Democratic Action (ADA), Arab American Institute (AAI), Asian Americans Advancing Justice—AAJC, Association of University Centers on Disabilities (AUCD), Bend the Arc: Jewish Action, Blue Wave Postcard Movement, Brennan Center for Justice, Center for Living & Working, Inc.

Center for the Study of Hate & Extremism—California State University, San Bernardino, CIAC, Citizens for Responsibility and Ethics in Washington (CREW), Clean Elections Texas, Colorado Latino Leadership Advocacy and Research Organization, Common Cause, Communications Workers of America (CWA), Community Catalyst, Declaration for American Democracy, Defending Rights & Dissent, Delta Sigma Theta Sorority, Inc., DemCast USA, Democracy 21, Demos, Empowering Pacific Islander Communities (EPIC), End Citizens United/Let America Vote Action Fund, Equal Citizens, Evangelical Lutheran Church in America, Fair Fight Action, FairVote, Feminist

Majority, Fix Democracy First, Florida Rising, Franciscan Action Network, Freedom From Religion Foundation.

Government Accountability Project, Human Rights Campaign, Impact Fund, Invisible, Japanese American Citizens League, Jewish Council for Public Affairs, Justice in Aging, Labor Council for Latin American Advancement, Lambda Legal, LatinoJustice PRLDEF, Leadership Conference of Women Religious, League of Conservation Voters, League of Women Voters of the United States, Louisiana Advocates for Immigrants in Detention, Matthew Shepard Foundation, Mi Familia Vota, Mid-Ohio Valley Climate Action, Movement Advancement Project, National Action Network, National Association of Human Rights Workers, National Black Justice Coalition, National Council of Churches of Christ in the USA.

National Council of Jewish Women, National Council of Jewish Women, Pennsylvania National Council on Independent Living, National Urban League, National Wildlife Federation, Native American Rights Fund, NETWORK Lobby for Catholic Social Justice, New Era Colorado, North Carolina Asian Americans Together, OCA-Asian Pacific Islander American Advocates Utah, OCA Greater Chicago, OCA-Asian Pacific American Advocates Greater Cleveland Chapter, OCA-Great Phoenix Chapter, OCA-Greater Houston, Our Vote Texas, People For the American Way, People's Parity Project, Planned Parenthood Action Fund, Public Citizen, Sierra Club, St. Louis Chapter of JACL, The Andrew Goodman Foundation, The National Vote, The New Pennsylvania Project, The Workers Circle, Union for Reform Judaism, Union of Concerned Scientists, Urban League of Union County, Inc., Voices For Progress.

STATEMENT OF ADMINISTRATION POLICY

H.R. 4—JOHN R. LEWIS VOTING RIGHTS ADVANCEMENT ACT OF 2021—REP. SEWELL, D-AL, AND 218 COSPONSORS

The Administration strongly supports House passage of H.R. 4, the John R. Lewis Voting Rights Advancement Act of 2021 (VRAA).

The right to vote freely, the right to vote fairly, the right to have your vote counted is fundamental. In the last election, all told, more than 150 million Americans of every age, of every race, of every background exercised their right to vote.

This historic level of participation in the face of a once-in-a-century pandemic should have been celebrated by everyone. Instead, some have sought to delegitimize the election and make it harder to vote, in many cases by targeting the methods of voting that made it possible for many voters to participate. These efforts violate the most basic ideals of America.

Yet another massive wave of discriminatory action may be imminent as we enter a new legislative redistricting cycle. Unfortunately, incumbents too often cling to power by drawing district lines to favor their own prospects at the expense of minority communities, choosing their voters instead of the other way around.

While anti-voter action undermines democracy for all Americans, we know that communities of color often suffer the worst effects of these measures—and all too often, that is not by accident.

The sacred right to vote is under attack across the country.

The VRAA will strengthen vital legal protections to ensure that all Americans have a fair opportunity to participate in our democracy. Among other things, it would create a new framework for allowing DOJ to review

voting changes in jurisdictions with a history of discrimination to ensure that they do not discriminate based on race. It would also clarify the scope of legal tools designed to challenge discriminatory voting laws in court, ensuring that the Voting Rights Act offers protection against modern forms of voter suppression.

In an essay published shortly after he died, Congressman John Lewis wrote, “Democracy is not a state. It is an act[.]” This bill not only bears his name, it heeds his call. The Administration looks forward to working with Congress as the VRAA proceeds through the legislative process to ensure that the bill achieves lasting reform consistent with Congress’ broad constitutional authority to protect voting rights and to strengthen our democracy.

[From the Brennan Center for Justice, Aug. 20, 2021]

VOTER SUPPRESSION IN 2020

(By William Wilder)

I. INTRODUCTION

In key respects, the 2020 elections demonstrated the strength and resilience of America’s electoral system. Voter turnout smashed records in almost every state, and despite unprecedented challenges from the pandemic, we did not suffer an election administration catastrophe. Opponents of voting rights suggest that these successes mean that voting barriers are no longer a significant concern and that our country has moved past the era of voter suppression. However, a closer look into turnout numbers reveals persistent and troubling racial disparities that are due in part to racial discrimination in the voting process. And in the 2020 election cycle, voter suppression was alive and well.

Overall, 70.9 percent of eligible white voters cast ballots in the 2020 elections, compared with only 58.4 percent of non-white voters. Despite significant gains in overall voter participation, the turnout gap between white and non-white voters has gone virtually unchanged since 2014 and has in fact grown since its modern-era lows in 2008 and 2012, according to a recent Brennan Center analysis.

During the same period, racially discriminatory voter suppression entered a new age. After the 2010 elections, for the first time since the peak of the Jim Crow era, states across the country began to enact laws making it more difficult to vote. This wave of voter suppression was intertwined with race and the nation’s changing racial demographics and was, at least in part, a backlash against rising turnout among communities of color contributing to the election of the nation’s first Black president. Efforts to suppress the votes of communities of color accelerated in 2013, when the Supreme Court gutted a key part of the Voting Rights Act in *Shelby County v. Holder*. In the eight years since, and especially in 2020, these trends continued.

Racial discrimination in voting takes many forms, ranging from blatant and open attempts to restrict access to voting among communities of color to more subtle policies that place heavier burdens on certain communities. In 2020, voters of color faced the full spectrum of racial voter suppression. This report provides an overview of the various forms of racially discriminatory voter suppression that took place in the 2020 elections and their aftermath.

The purpose of this report is to catalog instances of discriminatory voting changes and practices occurring in and since 2020 and provide context for the broader political movement behind many of these changes. In terms of voter suppression, 2020 was a banner

year, and not just because of the volume of racially discriminatory changes and incidents. Increasingly, the public officials and political operatives behind these voting changes are acknowledging that the intent of their new laws and policies is to exclude certain people from the electorate and bring about particular outcomes.

For example, as Arizona legislators were debating new restrictive voting bills, State Rep. John Kavanagh stated that Arizona Republicans “don’t mind putting security measures in that won’t let everybody vote” and that he was more concerned with the “quality of votes” than with overall voter turnout. When defending two of Arizona’s restrictive voting laws before the Supreme Court in March 2021, the attorney for the Republican National Committee admitted that the party’s interest in the laws was to avoid being at “a competitive disadvantage relative to Democrats.” And when discussing proposals to expand access to mail voting, President Trump stated that an expansion of early and mail voting would lead to “levels of voting that if you agreed to it, you’d never have a Republican elected in this country again.”

These statements do not represent judicial findings of intentional discrimination. But when viewed alongside the long list of instances of discrimination and racial disparities in the 2020 election cycle, these statements offer a window into discriminatory intent playing out in real time. This public rhetoric provides important context for understanding the full spectrum of discriminatory effects discussed in this report.

Examples of discriminatory voting practices—including new restrictive legislation, discriminatory voter roll purges, long lines and closed polling places, voter intimidation and misinformation, and efforts to overthrow elections through litigation or by invalidating ballots cast by mail—must all be viewed in the context of these obvious statements of intent. All of these instances are evidence of the same underlying problem: the persistence and evolution of unconstitutional racial discrimination in our election system.

[From the Brennan Center for Justice, July 29, 2021]

REPRESENTATION FOR SOME

THE DISCRIMINATORY NATURE OF LIMITING REPRESENTATION TO ADULT CITIZENS

(By Yuri I. Rudensky, Ethan Herenstein, Peter Miller, Gabriella Limón, and Annie Lo)

INTRODUCTION

Every 10 years, political districts at all levels of government are redrawn to make sure they are equal in population as required by the U.S. Constitution. Currently every state apportions representatives and draws congressional and state legislative districts on the basis of a state’s total population. That is, when districts are drawn, all people living in the state, including children and noncitizens, are counted for the purposes of representation.

However, some Republican political operatives and elected officials aim to unsettle this long-standing practice by excluding children and noncitizens from the population figures used to draw state legislative districts. Rather than count everyone, states would draw districts based only on the adult citizen population. This approach is rooted in an explicitly discriminatory plan to disadvantage growing Latino (and, to a lesser extent, Asian American and Black) communities. It would enable states to pack children and noncitizens, who are disproportionately Latino, Asian American, and Black,

into sprawling, supersized legislative districts. Residents of these districts would receive less representation than they do under the total population approach that states currently use, and this could have tremendous consequences for the funding of crucial public goods—including schools and transportation—that are used by everyone in a community regardless of age or citizenship status.

Making such a break with current practice and precedent would be of dubious legality and would leave states vulnerable to a host of legal challenges. It also would have major practical implications for redistricting. This study looks at what such a change would mean for representation and the allocation of political power in the United States by focusing on its impact three demographically distinct states: Texas, Georgia, and Missouri.

Our findings include the following:

Citizen children, not noncitizens, would account for the overwhelming majority of those excluded in adult citizen-based districts. Citizen children make up more than 70 percent of those who would be excluded in Texas, 80 percent in Georgia, and 90 percent in Missouri.

Large portions of the population in all three states would no longer be counted in adult citizen-based districts. Nearly 36 percent of the total population in Texas, 30 percent in Georgia, and 25 percent in Missouri would be excluded from the apportionment of legislative seats.

Communities of color would be disproportionately impacted. Latino and Asian American communities in particular would suffer substantially greater exclusion than their white counterparts. While only about 20 percent of the white population across the three states would be left uncounted, nearly 30 percent of the Black population and more than 50 percent of the Latino and Asian American populations would be excluded from legislative districts. The situation in Georgia would be particularly stark, with nearly 70 percent of Latino residents, most of whom are children, excluded.

Diverse metropolitan areas that support majority-minority districts would cede representation to whiter, more rural regions. The Houston, Dallas, and Rio Grande Valley regions of Texas would see sharp reductions in representation. In Georgia, the apportionment shift would hit metro Atlanta. And in Missouri, the representational losses would flow from areas around Kansas City and St. Louis. In all three states, many of the current districts that provide Latino and Black communities an opportunity to secure representatives of their choice would no longer be viable or would need to be significantly reconfigured.

Many of the areas that would be most impacted by an apportionment shift face deep inequities and new challenges, underscoring their urgent need for full representation. In Missouri, losses in representation would be borne primarily by Black neighborhoods in Kansas City and St. Louis that were formally segregated during the Jim Crow era and that continue to suffer from disinvestment. In Texas, under-populated districts, which would need to expand to bring in additional adult citizens, include much of historically Black Houston as well as overwhelmingly Latino areas, including colonias near the U.S.-Mexico border that increasingly face infrastructural and climate-related environmental dangers. In Georgia, representational losses would be concentrated in the rapidly diversifying suburbs of Atlanta, where communities of color are taking on historically white political establishments to address urgent political needs around education and policing.

[From the Brennan Center for Justice, Aug. 20, 2021]

RACIAL TURNOUT GAP GREW IN JURISDICTIONS PREVIOUSLY COVERED BY THE VOTING RIGHTS ACT

(By Kevin Morris, Peter Miller, and Coryn Grange)

In 2013, when Chief Justice John Roberts delivered the Supreme Court's majority opinion in *Shelby County v. Holder*, he argued that the Voting Rights Act of 1965's preclearance requirement under Section 5 was no longer needed because "African-American voter turnout has come to exceed white voter turnout in five of the six States [Alabama, Georgia, Louisiana, Mississippi, and South Carolina] originally covered by §5 with a gap in the sixth State of less than one half of one percent [Virginia]." Although this was true in 2012—and only 2012—the white-Black turnout gap in these states reopened in subsequent years, and by 2020, white turnout exceeded Black turnout in five of the six states.

REPLICATING THE SHELBY COUNTY OPINION METHODS

Using the same source of census data that was used in the *Shelby County* opinion, we show that the racial turnout gap has increased in most jurisdictions that were previously covered by preclearance. Racial turnout rates are calculated by dividing the number of ballots cast by the estimated citizen population above the age of 18. This analysis was compiled from the past 24 years of general-election voter data from eight states. The states used are based on the eight states the Voting Rights Advancement Act (VRAA), as introduced in 2019, will likely cover, according to recent congressional testimony by George Washington University law professor Peyton McCrary. Those states are Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Texas—all of which were covered in whole or in part by the preclearance provisions of the Voting Rights Act before *Shelby County*.

Broad conclusions made about the turnout of eligible Latino and Asian voters in states where they are underrepresented can be imprecise due to the small sample size provided by census data. We controlled for this deficiency in data by only analyzing states' Latino and Asian American turnout for years that had at least 30 Latino and Asian American eligible voters accounted for. Overall, we found that the larger the Latino and Asian American population of states, the closer the size the white-nonwhite turnout gap mirrored the results of the Brennan Center's examination of the same gap at a nationwide level, due to the greater representation of these undercounted groups. When this wasn't the case, the white-nonwhite gap more closely mirrored the white-Black gap.

We also believe the white-nonwhite gap may be underestimated, as the census data we use for analysis fails to provide information on Native American voter turnout, a group that is significantly impacted by discriminatory voting laws. However, we do know from the National Congress of American Indians that registered voters in this group have a lower turnout rate than other racial groups, which provides the basis for our assumption.

RACIAL TURNOUT GAPS IN JURISDICTIONS TO BE COVERED BY THE VOTING RIGHTS ADVANCEMENT ACT

While in 2012, just before the *Shelby County* decision, the white-Black turnout gap was shrinking in the states we analyzed, and in many instances even briefly closed, this trend has reversed in the years since. In 2012, seven out of the eight states had Black voter

turnout higher than that of white voters. In 2020, the reverse is true—in only one of the eight states was Black turnout higher than white turnout.

In a few states, this reversal is especially alarming. Louisiana, South Carolina, and Texas had higher turnout gaps in 2020 than at any point in the past 24 years. South Carolina's white-Black turnout gap widened the most, expanding by a staggering 20.9 percentage points within the eight years since *Shelby County*. While Black turnout exceeded white turnout in 2012, white turnout was more than 15 percentage points higher than Black turnout in 2020.

A similar trend can be seen in the gap between white voters and all nonwhite voters. The total white-nonwhite turnout gap has grown since 2012 in all of the eight states likely to be covered under the VRAA. There is sufficient data to conclude that the gap has increased for Blacks, Hispanics, and Asians in Florida, Georgia, North Carolina, South Carolina, and Texas. In Alabama, Louisiana, and Mississippi, the sample sizes in the available 2020 census data are too small for Hispanic and Asian voters to make much of a difference in an overall white-nonwhite turnout gap estimation that is distinct from the white-Black turnout gap in those states. Notably, North Carolina went from having a larger share of nonwhite voters represented in 2012 with a white-nonwhite gap of -9.3 percentage points to having a gap of 5.4 percentage points, a jump of 14.7 percentage points, far greater than the national average of 4.6 percentage points.

Overall, we see that the growth in the racial turnout gaps between 2012 and 2020 were even starker in the states likely to be subject to preclearance under the VRAA than those seen nationwide. Seven out of the eight states had white-nonwhite turnout gaps that grew more than the national rate of 4.6 percentage points between 2012 and 2020. And in four out of the eight states to be subject to preclearance under the VRAA, the white-Black turnout gap grew more than the national rate of 10.3 percentage points from 2012 to 2020.

Expanding the analysis to other nonwhite groups also reveals that, even in 2012, progress on closing racial turnout gaps was not as significant as the *Shelby County* decision suggested. The Court only examined the white-Black turnout gap, which did temporarily close in many states in 2012, likely due to Barack Obama being on the ballot and Black voter turnout subsequently surging. But with the exception of Latino voter turnout briefly surpassing white turnout in Florida in 2012 and Louisiana in 2012 and 2016, Latino voter turnout has lagged behind white voter turnout for the last 24 years in every state where those rates are measurable.

SHELBY COUNTY'S AFTERMATH

In 2013, the Supreme Court suggested that the closing of the racial turnout gap supported the conclusion that the need for preclearance was over. As this analysis shows, in the years following the *Shelby County* decision, these racial turnout gaps widened once again. The reopening of the racial turnout gap likely has many causes, and it is possible that the ending of the preclearance condition has played a role. What is clear, however, is that the trends identified by the Supreme Court have reversed themselves with alarming speed.

[From the Brennan Center for Justice, Aug. 6, 2021]

LARGE RACIAL TURNOUT GAP PERSISTED IN 2020 ELECTION

(By Kevin Morris and Coryn Grange)

In the 2020 election, voter turnout surged as more Americans cast ballots than in any

presidential election in a century, despite a global pandemic. This was true for the entire electorate as well as for each racial group—more Black Americans voted in 2020 than any presidential election since 2012, and Latino Americans and Asian Americans also surpassed their previous turnout records. (Unfortunately, we don't have comparable figures for Native Americans.)

These successes have been and should be celebrated. However, they must not be mistaken for signs that racial discrimination in voting is no longer an enormous problem, one that continues to advantage white voters to a degree that must be remedied.

The 2020 election must also be remembered for another turnout statistic: 70.9 percent of white voters cast ballots while only 58.4 percent of nonwhite voters did. As the graph below shows, 62.6 percent of Black American voters, 53.7 percent of Latino American voters, and 59.7 percent of Asian American voters cast ballots in 2020.

There is ample evidence that the sorts of barriers being introduced this year disproportionately reduce turnout for voters of color. The gaps between white and nonwhite voters are bound to get worse. That's why it's necessary to reverse these new voting restrictions.

NARROWING THE GAP, BUT ONLY TEMPORARILY

The difference between white and nonwhite voter turnout has remained relatively unchanged over the last six presidential elections, with a few notable fluctuations. In 2008 and 2012, Barack Obama was on the ballot, and turnout among Black voters in those elections was higher than at any point since 1996. And in 2012, the gap between white and nonwhite voter turnout narrowed to 8 percentage points, the lowest since 1996.

The graph below shows that after reaching that record low in 2012, the turnout gap expanded once again between white voters and nonwhite voters, reaching 12.6 percentage points in the 2016 presidential election and 12.5 in 2020.

The graph also shows a decrease in nonwhite voter turnout between the 2008 and 2012 elections. After the record turnout in 2008, many state legislatures reacted by quickly passing a spate of new restrictive voting laws that made it disproportionately difficult for voters of color to cast ballots.

In 2013, the Supreme Court used the narrowing of the turnout gap between white and Black voters in 2008 and 2012, as seen in the following graph, to justify gutting key protections against racial discrimination in the Voting Rights Act of 1965. That ruling in *Shelby County v. Holder* made it easier for states to enact restrictive policies.

THE GAPS BETWEEN WHITE VOTERS AND INDIVIDUAL RACIAL GROUPS

2021 looks like 2009 in that high nonwhite voter turnout in the presidential election has been followed by restrictive voting laws, but there's a crucial difference. As the graph above indicates, the racial turnout gap narrowed between 2004 and 2008, but not between 2016 and 2020. The 2021 backlash is coming at a point when the disparities in turnout between racial groups are significantly larger than they were in 2008 and 2012.

While the gap between nonwhite voters and white voters has stayed about the same in the 2016 and 2020 elections, the gaps between white voters and voters of specific racial groups have varied. As the graph below demonstrates, the white-Asian gap narrowed significantly, from 16.3 percentage points in 2016 to 11.3 points last year, even as the white-Black turnout gap widened relative to 2016, going from 5.9 percentage points to 8.3 points. This is not to say that the white-Asian gap closed. As the graph makes clear, the white-Asian gap had previously been

very large, and although the white-Asian turnout gap reached its lowest level in at least two decades in 2020, white voter turnout was still more than 10 percentage points higher than that of Asian Americans.

This narrowing of the white-Asian gap was offset by an increase in the white-Black turnout gap from 2016 to 2020. As the graph shows, the white-Black gap has consistently grown since 2012. In 2020, it reached the highest point in a presidential election since at least 1996.

The white-Latino turnout gap has previously been very large, and the same was true in 2020. At 17.2 percentage points, the 2020 white-Latino turnout gap was larger than the gaps between white voters and other racial groups, and it remained virtually unchanged from 2016.

As noted earlier, the Census Bureau data we draw on for this analysis fails to give us insight into the relative turnout of another group regularly impacted by discriminatory voting laws: Native Americans. However, we do know from the National Congress of American Indians that registered voters in this group have a lower turnout rate than other racial groups and face unique difficulties accessing the ballot box along with the ones faced by other nonwhite Americans.

2008 BACKLASH VERSUS TODAY

Like the backlash after high turnout in 2008, we are now experiencing another wave of restrictive voting laws, along with *Brnovich v. Democratic National Committee*, another Supreme Court ruling that weakens the Voting Rights Act and will make challenging racially discriminatory voting laws even harder. This backlash, however, does not come on the heels of the narrowest racial turnout gap in a generation. This time, it follows a racial turnout gap that remained steady and even grew for Black Americans.

Across the United States, political organizers successfully mobilized communities of color in 2020. But the record-breaking overall turnout was not enough to close the racial turnout gap. And in the aftermath of the Supreme Court's *Brnovich* decision in, the Voting Rights Act's protections for racial minorities are weaker than ever. It is imperative to stop the new restrictive voting laws and provide tools to fight race discrimination in voting.

[From the Committee on House Administration, Chairperson Zoe Lofgren (D-Calif.), Subcommittee on Elections, 117th Congress, July, 2021]

REPORT ON VOTING IN AMERICA: ENSURING FREE AND FAIR ACCESS TO THE BALLOT
(Prepared by Chair G. K. Butterfield, D-N.C.)

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Finally, the Subcommittee extends its deep thanks to Elvis A. Norquay, a member of the Turtle Mountain Band of Chippewa Indians, a veteran of this country, and a voter, whose testimony before the Subcommittee in February 2020 on being denied the ability to vote serves as a powerful reminder that no person should be disenfranchised in America. Mr. Norquay is no longer with us, but may his memory continue to be a blessing and an inspiration.

Executive Summary

Since our founding, Americans have not enjoyed equal access to the ballot. Indeed, only a small fraction of the population cast ballots in the election elevating George Washington as our first president. Throughout our history, the country has made strides forward, but that progress was neither linear nor uncontested, and access to the ballot remains unequal. Following nearly 100 years of suppression and discrimination in the post-Civil War United States, and a decades-long fight for equality and access to the vote, on August 6, 1965, President Lyndon B. Johnson signed the Voting Rights Act of 1965 into law. The purpose of the Voting Rights Act was to, “banish the blight of racial discrimination in voting.” And for nearly 50 years it served this purpose.

However, in 2013, the Supreme Court undercut a key provision of the Voting Rights Act in *Shelby County v. Holder*. In finding the Section 4(b) coverage formula unconstitutional, the Section 5 preclearance provisions were rendered essentially inoperable. States that were once covered by the Voting Rights Act (“VRA”), and therefore required to preclear their voting changes with the U.S. Department of Justice to ensure they did not have a discriminatory impact on minority voters, were now free to enact changes without oversight, and with only the threat of reactive litigation under Section 2 of the Voting Rights Act or the Constitution standing in their way. Since the Court's decision in *Shelby*, states across the country have enacted new, suppressive voting and

election administration laws that disproportionately and discriminatorily impact minority voters.

On July 1, 2021, the Supreme Court undermined the Voting Rights Act yet again in *Brnovich v. DNC*. Writing for the majority, Justice Samuel Alito weakened the protections Congress explicitly wrote into the statute in 1982 and reauthorized in 2006, and instead set forth a new set of guideposts that will arguably make it harder to combat discriminatory restrictions on voting. In her dissent, Justice Elena Kagan wrote, “the majority writes its own set of rules, limiting Section 2 from multiple directions. Wherever it can, the majority gives a cramped reading to broad language.”

Time and again, in courtrooms across the country, it has been proven that racially polarized voting has existed at the ballot box since 1870, when the Fifteenth Amendment was ratified, and it persists today. Millions of Black, Latino, Asian American, Native American, and other minority voters have again become the targets of voter suppression.

COMMITTEE ON HOUSE ADMINISTRATION AND SUBCOMMITTEE ON ELECTIONS

The Committee on House Administration was established in 1947. Oversight of federal elections became one of the Committee's chief tasks at its inception. After more than 70 years, the Committee's principal functions still include oversight of federal elections. Under Rule X of the Rules of the House, the Committee on House Administration has jurisdiction over “Election of the President, Vice President, Members, Senators, Delegates, or the Resident Commissioner; . . . and federal elections generally.” Since its creation, the Committee on House Administration has had a hand in shaping legislation that touches on any and all aspects of federal elections.

In exercising those powers, throughout the 116th and 117th Congresses, the Subcommittee on Elections of the Committee on House Administration has reviewed the state of voting in America, collecting thousands of pages of testimony and evidence—and the conclusion is clear: minority voters in America face ongoing discrimination in voting and barriers to the ballot box.

In writing for the majority in *Shelby County*, Chief Justice John Roberts wrote that “[t]he Fifteenth Amendment is not designed to punish for the past; its purpose is to ensure a better future.” Moreover, the Chief Justice wrote that Congress must craft a remedy that, “makes sense in light of current conditions.” The Subcommittee endeavored to learn and gather the most contemporaneous evidence available and to identify the voting and election administration practices that cause discriminatory harm to voters—that evidence is summarized in the report that follows.

To collect this evidence, the Subcommittee on Elections held eight hearings and a listening session in the 116th Congress, calling more than 60 witnesses, gathering several thousand pages of written testimony, documents, and transcripts, and hearing hours of oral testimony. To begin the process, the Subcommittee cast a broad reach, examining all manner of voting rights and election administration barriers. That process resulted in a report detailing a wide range of issues in voting and election administration laws implemented by states in the years following the *Shelby County* decision.

Building upon the record gathered during the prior Congress and continuing the collection of contemporaneous evidence to establish the state of “current conditions,” during the 117th Congress the Subcommittee embarked on a series of five investigatory hear-

ings. Under the Chairmanship of Congressman G. K. Butterfield (D-N.C.), the Subcommittee identified those voting and election administration practices that the Subcommittee observed previously, including those which exhibited the most significant evidence of discriminatory impact, and investigated further. In doing so, the Subcommittee determined that a number of specific practices warranted a more in-depth examination, specifically: (1) voter list maintenance and discriminatory voter purges; (2) voter identification (“voter ID”) and documentary proof of citizenship requirements; (3) lack of access to multi-lingual voting materials and language assistance; (4) polling place closures, consolidations, reductions, and long wait times; (5) restrictions on additional opportunities to vote; and (6) changes to methods of election, jurisdictional boundaries, and redistricting.

The Subcommittee heard hours of testimony from more than 35 witnesses and collected numerous reports and documents. The testimony and data show definitively that the voting and election administration practices examined can and do have a discriminatory impact on minority voters and can impede access to the vote.

Key findings of the Subcommittee include:

(1) Purging voters from voter rolls can disproportionately flag for removal, mark as inactive, or ultimately remove otherwise eligible minority voters from the rolls. Although voter list maintenance, when conducted correctly, is appropriate and necessary, misconceived, overzealous list maintenance efforts have erroneously sought to remove hundreds of thousands of properly registered voters and, in doing so, disproportionately burden minority voters. In the years following the *Shelby* decision, millions of voters have been removed from the voting rolls—and states once subject to the Voting Rights Act saw purges at a 40 percent higher rate than the rest of the country. As Sophia Lin Lakin of the ACLU testified before the Subcommittee:

“Some of these troubling purge practices are based on unreliable data and/or procedures or dubious proxies that disproportionately sweep in, and ultimately disenfranchise, voters of color. Oftentimes, such purges have occurred too close to an election to permit corrective action, with voters arriving at the polls only to discover they have been removed from the rolls and unable to cast a ballot that will count.”

For example, mailers initiating a Wisconsin voter purge effort were disproportionately sent to counties with disproportionately large Black and Latino populations—over one-third of mailers were sent to areas that are home to the largest Black voting populations, while the Black voting population comprises only 5.7 percent of the total electorate. Additionally, Dr. Marc Meredith of the University of Pennsylvania testified that research, “demonstrates that minority registrants are more likely than White registrants to be incorrectly identified as no longer eligible to vote at their address of registration.”

(2) Voter identification and documentary proof-of-citizenship requirements disproportionately burden minority voters. Discriminatory strict voter ID laws were some of the first voting laws implemented in the wake of *Shelby County*—in 2013, at least six states implemented or began to enforce strict voter ID laws, some of which had been previously blocked by the Department of Justice under Section 5 of the Voting Rights Act. Studies have consistently demonstrated that minority voters are disproportionately likely to lack the forms of ID required by voter ID laws and are disproportionately burdened by the time and expense of acquiring the under-

lying documents and IDs. The consequence is a negative impact on turnout amongst minority voters. A recent study found that Latinos, for example, are 10 percent less likely to turnout in general elections in states with strict ID laws than in states without such laws. Even when states offer “free” IDs, the actual cost of obtaining a qualifying photo ID ranged from \$75 to \$368 due to indirect costs associated with travel time, waiting time, and obtaining necessary supporting documentation. The documents required to establish proof-of-citizenship are also particularly expensive to obtain for naturalized and derivative citizens, sometimes costing in excess of \$1,000.

The burden of these requirements disproportionately fall on Black, Latino, Asian American, and Native American voters, and newly naturalized citizens. Recent studies have demonstrated that Black and Latino voters are less likely to have access to birth certificates and passports—documents often required to establish proof of citizenship—than White voters. For example, Asian Americans will face greater barriers to registration than White voters under proof-of-citizenship laws. As Terry Ao Minnis, Senior Director of Census and Voting Programs for Asian Americans Advancing Justice, testified, “76.7 [percent] of Asian American adults are foreign-born and 39.5 [percent] of Asian American adults have naturalized nationwide, compared to 4.6 [percent] of White adults who are foreign-born and 3.8 [percent] who have naturalized.” Numerous studies also have demonstrated that strict voter ID laws disproportionately decrease registration and turnout of minority voters relative to White voters. Dr. Nazita Lajevardi of the University of Michigan testified that, “strict voter identification laws are racially discriminatory and have real consequences for impacting the racial makeup of the voting population.”

(3) Access to multi-lingual voting materials and assistance is critical to ensuring equal access to the ballot—failure to do so can negatively impact millions of potential voters, a disproportionate number of whom are minority voters. The demographics of America are shifting, with millions of new Latino and Asian American voters, for example, joining the rolls every election. The number of eligible Asian Americans grew by almost 150 percent from almost 5 million in 2000 to over 11.5 million in 2020—this compared to a growth rate of 24 percent for the total population over the same period. Furthermore, American Community Survey (ACS) data estimate show that Latinos accounted for just over half the nation's population growth between 2010 and 2019, and ACS data estimate shows that Latinos made up over 44 percent of the entire nation's growth in citizen, voting-age population, between 2009 and 2019.

According to 2017 data, more than 85 percent of the voters who likely require language assistance in voting were voters of color. As of 2019, approximately 4.82 percent of the citizen voting-age population needs to cast a ballot in a language other than English. For example, over a quarter of all single-race American Indian and Alaska Natives speak a language other than English at home, almost three out of every four Asian Americans speak a language other than English at home, and almost one in three Asian Americans has limited English proficiency. When limited-English proficient (LEP) voters are provided with voting materials in their native language the likelihood they will participate in the political process increases. Dr. Matt Barreto of the UCLA Latino Policy and Politics Initiative testified that studies have found, “between a 7 and 11 point increase in voter turnout given

access to Spanish materials.” Conversely, failure to provide the proper non-English voting materials has, “a tremendously negative impact on those communities’ ability to understand and participate in our elections.”

(4) Polling place closures, consolidations, reductions, and long wait times at the polls all disproportionately burden minority voters and can be implemented in a discriminatory manner. Issues related to polling place locations, quality, accessibility, and the ensuing long wait times to vote are pervasive. Over the past decade, it has been well documented that racial minorities wait longer to vote on election day than White voters. Additionally, disparities in polling place accessibility and wait times are compounded by the disparate impact of other discriminatory practices such as voter ID laws, voter purges, and cuts to alternative opportunities to vote. A lack of available polling place locations necessitates traveling long distances to vote, which also disproportionately burdens minority voters, in particular Native American voters. A 2019 report by The Leadership Education Fund found that between 2012 and 2018 a total of 1,688 polling places had been closed in the previously covered jurisdictions examined, almost double the rate identified in 2016. Polling place closures and long wait times have been shown to reduce the likelihood a voter will vote in a subsequent election, decreasing turnout. Minority voters not only wait longer on average, but they are also more likely to experience wait times exceeding 60 minutes, a wait time largely recognized as unacceptable. Dr. Stephen Pettigrew of the University of Pennsylvania testified that, “[a] voter’s race is one of the strongest predictors of how long they wait in line to vote: non-white voters are three times more likely than White voters to wait longer than 30 minutes and six times as likely to wait more than 60 minutes.” Additionally, long lines negatively impact voters’ confidence in the electoral system. Dr. Pettigrew testified that, “[v]oters who wait in a long line are less likely to believe that their vote choices would be kept a secret, and less likely to be confident that their vote was counted correctly” and that, “[b]ecause voters’ experiences at the polling place have downstream consequences on their future turnout behavior and their confidence in the electoral system, policies that widen the wait time gap between White and non-white voters have the potential to put a thumb on the electoral scale by reshaping the electorate.”

(5) Restricting access to opportunities to vote outside of traditional Election Day voting has a disproportionate and disenfranchising impact on minority voters. Early voting, and especially weekend early voting, is a critical tool to ensuring access to the ballot and reducing wait times at the polls. Specifically, Dr. Michael Herron of Dartmouth College testified that, “changes to early voting hours that reduce pre-Election Day, Sunday voting opportunities should be expected to disproportionately affect Black voters” and that, if a state were to eliminate Sunday early voting, “the cost of voting for Black voters would disproportionately increase compared to White voters given the relatively heavy use of Sunday early voting by Black voters.” However, permitting early voting opportunities without providing meaningful access to them amounts to essentially no access. In discussing access for Native American voters, Professor Patty Ferguson-Bohnee, Director of the Indian Legal Clinic at the Sandra Day O’Connor College of Law testified that, “[e]arly voting opportunities located hours away effectively amount to no access to in-person early voting in light of the practical effects of requiring voters to travel such distances.” Opportunities to vote such as in-person early voting, mail-in voting, curbside

and drive-thru voting, or the ability to return a voted mail-in ballot at a drop box have all been used with increasing frequency by minority voters, making them a target for suppressive cutbacks and restrictions by state legislatures that will disproportionately burden those same minority voters.

(6) Changes to methods of election, jurisdictional boundaries, and redistricting impact whether voters can elect candidates that reflect their voices and communities. Discriminatory redistricting, vote dilution, changing of jurisdictional boundaries, and changes to methods of election have all been utilized throughout American elections—from local school board contests to Congressional races—to dilute growing voting power in minority communities. The country is entering the first redistricting cycle without the protections of the Voting Rights Act in more than a half century. According to a 2018 U.S. Commission on Civil Rights report on minority voting rights access, “overall data show that there have been over 3,000 changes submitted due to redistricting in every 10-year cycle since the 1965 VRA was enacted.” Without VRA protections, it can take years of expensive, time consuming litigation to rectify these discriminatory practices, all while elections are conducted under district maps and voting structures that are later found to be unlawful. Evidence and testimony presented to the Subcommittee clearly illustrated that these practices are enacted with discriminatory effect and intent.

Each of the chapters that follows details the evidence gathered by the Subcommittee on each of these practices—clearly demonstrating the findings of the Subcommittee that each warrants a heightened level of scrutiny and attention from Congress to ensure every American has equal, equitable access to the ballot.

The increase in voter turnout in both the 2018 and 2020 elections has not been met with celebration in statehouses across the country but has instead been met with backlash and false claims of fraud—claims that are being used to justify voter suppression and the passage of laws that will disenfranchise minority voters. Investigations have repeatedly found no evidence of widespread fraud in American elections. Fraud in American elections is vanishingly rare. A person is more likely to be struck by lightning than to commit voter-impersonation fraud. Other analyses found just 31 credible instances of impersonation fraud from 2000 to 2014, out of more than one billion ballots cast.

In 2021, our democracy is under attack. According to the Brennan Center for Justice, as of July 14, 2021, lawmakers had introduced more than 400 bills in 49 states to restrict the vote—at least four times the number of restrictive bills introduced just two years prior. To date, at least 18 states have enacted new laws containing provisions that restrict access to voting.

June 2021 marked the eighth anniversary of the Shelby County decision. That decision unleashed a torrent of voter suppression bills, many in previously covered jurisdictions, which continues today. Congress has the power—a power the U.S. Supreme Court has called “paramount” for 142 years—and duty to act. As detailed in this report, there is much work to be done.

CHAPTER ONE—INTRODUCTION AND THE HISTORY OF DISCRIMINATION IN VOTING AMERICA’S LONG HISTORY OF DISCRIMINATING IN VOTING

Since the Founding, Americans have not enjoyed equal access to the ballot. At her opening, the Declaration of Independence said “all men are created equal”—yet enslaved persons, indentured servants, Native Americans, and women were all denied the right to vote.

The Thirteenth, Fourteenth, Fifteenth, Nineteenth, Twenty-third, Twenty-fourth,

and Twenty-sixth Amendments all expanded access to the franchise not previously experienced by millions of Americans despite the promise of equality. This expansion did not come without bitter divides and opposition. The Thirteenth, Fourteenth, and Fifteenth Amendments—known collectively as the Reconstruction Amendments—expanded access to the ballot for millions of Black Americans in the post-Civil War era, and gave Congress the power to enforce the rights granted in these Amendments through appropriate legislation.

Yet, while the immediate post-Civil War era brought about greater political representation for Black Americans, following the electoral crisis of 1876, former Confederates and their sympathizers seized control of southern state governments by brutally suppressing Black voters and eliminating the power of the Reconstruction Republican Party. By the 1890s, suppression tactics led to most African Americans having either been barred from or abandoned electoral politics as violence and economic reprisals became a constant threat to political participation and segregation was legalized. Southern legislators passed laws such as poll taxes, grandfather clauses, literacy tests, and felon disenfranchisement, with the explicit intent of removing Black voters from the rolls.

Indeed, the same barriers existed for Native Americans. In 1884, the Supreme Court held in *Elk v. Wilkins* that the Fourteenth Amendment did not provide citizenship to Native Americans. Not until passage of the Indian Citizenship Act in 1924 did most Native Americans gain full citizenship and voting rights without undermining or negating their right to remain a member of their tribe. Despite passage of the Act and subsequent passage of the Nationality Act of 1940, many states continued to deny Native Americans equal access to the ballot, claiming they were ineligible to vote because they were not residents of that state. Not until 1957 and 1958 did Utah and North Dakota, respectively, become the last states to afford on-reservation Native Americans the right to vote.

The Nineteenth Amendment granted women the right to vote when it was ratified in 1920. The Twenty-third Amendment allowed residents of the District of Columbia to vote for President and Vice President (1961). The Twenty-fourth Amendment outlawed poll taxes or any other tax to vote (1964), and the Twenty-sixth Amendment lowered the voting age to 18 and banned the denial or abridgement of the vote based on age (1971).

The U.S. government also systematically denied citizenship and voting rights to Asian Americans. Not until the repeal of the Chinese Exclusion Act in 1943 and the passage of the McCarran-Walter Act in 1952 were all Asian Americans granted the right to become citizens and therefore eligible to vote.

A CONSTITUTIONAL RIGHT TO VOTE

To this day, scholars argue that the Constitution does not guarantee the right to vote as a positive right—that the amendments do not provide an affirmative grant but disallow the government from restricting the franchise based on protected criteria—race, sex, paying a poll tax, and age. However, while the text of the Constitution does not explicitly provide for and protect the vote as a fundamental right, the Supreme Court has long recognized that voting is a fundamental right.

Voting and equal, equitable access to the ballot are cornerstones of creating a true democracy. Justice Hugo Black, in *Wesberry v. Sanders*, stated that:

“No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.”

Professor Guy-Uriel Charles of Duke Law School noted in his testimony before the Committee that, “since at least 1886, in *Yick Wo v. Hopkins*, the Supreme Court has recognized that voting is a fundamental right of citizens and that its availability is critical to sustaining representative government.” In 1964, Chief Justice Earl Warren wrote, “[t]he right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of the representative government.” More recently, Chief Justice John Roberts noted, “[t]here is no right more basic in our democracy than the right to participate in electing our political leaders.”

THE VOTING RIGHTS ACT, PRECEDENT, AND
SHELBY COUNTY V. HOLDER

Despite the protections from racial discrimination in voting afforded in theory under the Reconstruction Amendments, for nearly 100 years after their passage, Black Americans were “systematically disenfranchised by poll taxes, literacy tests, property requirements, threats, and lynching.” To address the systemic discrimination and barriers in voting, on August 6, 1965, President Lyndon B. Johnson signed the Voting Rights Act of 1965 into law.

One of the pillars of the Civil Rights laws of the 1960s, the Voting Rights Act of 1965 (“VRA”) was enacted to address election laws and practices that discriminated on the basis of race and ethnicity. In the decades following its enactment, the VRA went a long way to addressing the widespread racial discrimination in voting. The VRA was designed to fight, “an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.” Prior to the passage of the VRA, when the U.S. Department of Justice obtained favorable decisions striking down suppressive, discriminatory voting practices, states would merely enact new schemes to restrict access to the ballot for Black voters.

The VRA placed a nationwide prohibition on states, or political subdivisions, from implementing voting qualifications or prerequisites, standards, practices, or procedures to, “deny or abridge the right of any citizen to vote on the basis of race or color.” Originally set to expire five years after enactment, the VRA was subsequently amended and extended by Congress on a bipartisan basis several times. Congress continued to support the underlying policy of the Voting Rights Act while voting to amend, expand, and extend the law five times: in 1970, 1975, 1982, 1992, and 2006.

Each time, the law was reauthorized with overwhelming, bipartisan support. Moreover, all of the multiple reauthorizations were signed into law by Republican Presidents. The 2006 reauthorization, the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 passed the House of Representatives overwhelmingly following introduction by Representative James Sensenbrenner, Jr. (R-Wisc.), passed the Senate unanimously, and was signed into law by President George W. Bush.

Since the VRA’s initial passage, and through the subsequent amendments and reauthorizations, the Supreme Court repeatedly affirmed Congress’s authority to enact statutes that prohibit states and localities from imposing voting laws that intentionally discriminate on the basis of race or ethnicity. In *South Carolina v. Katzenbach*, the Court held that the Voting Rights Act was, “a valid means for carrying out the commands of the Fifteenth Amendment.” The Court would later uphold the Voting

Rights Act again in cases such as *City of Rome v. United States* (1980) and *Lopez v. Monterey County* (1999). Furthermore, the Court has long upheld Congress’s broad authority under the Constitution to pass laws and regulations governing federal elections.

The Supreme Court has long affirmed the breadth of Congress’s power to enact laws regulating elections. As Professor Guy-Uriel Charles noted in his testimony before the Committee, as early as 1880, the Supreme Court noted in *Ex parte Siebold* that Congress’s Elections Clause power to regulate Congressional elections, “may be exercised as and when Congress sees fit to exercise it,” and, “necessarily supersedes,” conflicting state regulations. Professor Charles further testified that, “[t]hus, although the Supreme Court has at times interpreted federalism as a constraint on Congressional power derived from the Fourteenth and Fifteenth Amendments, Congress’ power to regulate federal elections is uniquely unencumbered by federalism constraints.”

Professor Franita Tolson of the University of Southern California Gould School of Law testified before the Committee that, despite the view by some that exercises of federal authority under the Elections Clause as a somewhat unwelcome intrusion on the states’ authority to legislate with respect to federal elections, “Congress can disregard state sovereignty in enacting and enforcing legislation passed pursuant to the Elections Clause.” Additionally, Professor Daniel P. Tokaji of the University of Wisconsin Law School testified that the Court’s, “most recent—and arguably most important—explanations,” of Congress’s power came in *Arizona v. ITCA*, in which the Court noted that, “the usual presumption against federal preemption of state law does not apply to legislation enacted under the Elections Clause While states historically enjoyed broad police powers over other matters, their regulation of congressional elections has always been subject to congressional revision or reversal.”

The Supreme Court has also long held that Congress’s power to enforce the Fourteenth and Fifteenth Amendments extends beyond intentional discrimination. In *City of Rome v. United States*, the Court considered a municipality’s challenge to the constitutionality of Section 5 of the VRA, to the extent that it authorized invalidation of a state or local election law based solely on evidence that the law had a discriminatory effect. The Court rejected the municipality’s constitutional challenge, holding that Congress’s power to enforce the Reconstruction Amendments extended beyond prohibiting intentionally discriminatory voting laws. The Court reasoned that Congress’s authority to enforce the Reconstruction Amendments is coextensive with its authority under the Necessary and Proper Clause, which empowers Congress to enact any law that is, “appropriate,” “adapted to carry out the objects,” of the Fourteenth or Fifteenth Amendment, and not prohibited by another provision in the Constitution.

Applying that test, *City of Rome* made clear that, “under the Fifteenth Amendment, Congress may prohibit voting practices that have only a discriminatory effect.” In particular, “under § 2 of the Fifteenth Amendment Congress may prohibit practices that in and of themselves do not violate § 1 of the Amendment [in that they are intentionally discriminatory], so long as the prohibitions attacking racial discrimination are ‘appropriate,’ as that term is defined in *McCulloch v. Maryland* and *Ex parte Virginia*.”

Despite decades of precedent that uphold Congressional power and the VRA, in 2013, the Supreme Court struck down portions of

the 2006 VRA reauthorization in *Shelby County v. Holder* (“*Shelby County*” or “*Shelby*”), leaving American voters vulnerable to tactics of suppression and discrimination. In its ruling, the Court struck down Section 4(b) as outdated and not “grounded in current conditions.” The Supreme Court ruled that Section 4(b)’s coverage formula violated implicit equal sovereignty principles in the Constitution because it treated states differently—requiring certain states and localities, but not others, to obtain preclearance—but relied on sometimes decades old data to justify that differential treatment.

The Court found the data upon which Congress relied in reauthorizing the VRA—evidence dating to the 1960s and 1970s of differential registration rates between White and Black voters and the use of literacy tests to depress minority voting, for example—to be insufficient to meet that standard, particularly in light of documented improvements in minority voter registration rates and turnout. By invalidating the coverage formula, *Shelby County* essentially rendered Section 5 inoperable, allowing previously covered states and localities to make changes to their voting laws without seeking preclearance from the Department of Justice.

At the same time the Court upended the VRA, Chief Justice Roberts conceded that discrimination in voting still exists, writing, “[a]t the same time, voting discrimination still exists; no one doubts that.” Despite this, Chief Justice Roberts’ majority opinion declared that the data before the Court undergirding the reauthorization of the VRA was outdated:

“The question is whether the Act’s extraordinary measures, including its disparate treatment of the States, continue to satisfy constitutional requirements. As we put it a short time ago, ‘the Act imposes current burdens and must be justified by current needs.’”

The Chief Justice did, however, expressly suggest that Congress may remedy this and restore the effect of the preclearance regime by updating the coverage formula, providing a roadmap for Congressional action:

“Striking down an Act of Congress ‘is the gravest and most delicate duty that this Court is called on to perform.’ *Blodgett v. Holden*, 275 U. S. 142, 148 (1927) (Holmes, J., concurring). We do not do so lightly. That is why, in 2009, we took care to avoid ruling on the constitutionality of the Voting Rights Act when asked to do so, and instead resolved the case then before us on statutory grounds. But in issuing that decision, we expressed our broader concerns about the constitutionality of the Act. Congress could have updated the coverage formula at that time, but did not do so. Its failure to act leaves us today with no choice but to declare §4(b) unconstitutional. The formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance.”

“Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in §2. We issue no holding on §5 itself, only on the coverage formula. Congress may draft another formula based on current conditions. Such a formula is an initial prerequisite to a determination that exceptional conditions still exist justifying such an ‘extraordinary departure from the traditional course of relations between the States and the Federal Government.’ *Presley*, 502 U.S., at 500–501. Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.”

Without the full protections of the VRA, states are free to implement discriminatory

voting laws without preemptive Justice Department oversight. While Section 2 of the VRA remains an avenue for combatting discriminatory voting laws in the courts, Section 2 lawsuits are reactive, filed only after laws have been enacted, often take years and extensive resources to litigate, and all while elections may be conducted under restrictions later found to be unlawful. Prior to the Supreme Court's decision in *Shelby County*, nine states were covered by statewide preclearance requirements under the VRA's coverage formula in Section 4(b) and the preclearance regime of Section 5. Preclearance required the states and localities captured under the coverage formula to seek and receive administrative approval from the U.S. Department of Justice ("DOJ" or "Justice Department") or judicial review by the U.S. District Court for the District of Columbia prior to making changes to their voting laws. At the time *Shelby County* was decided, Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia were the states covered as a whole. Additionally, counties in California, Florida, New York, North Carolina, South Dakota, and townships in Michigan, were previously covered under Section 5 though each state itself was not covered as a whole. Throughout the history of the VRA, counties have also "bailed out" of coverage—meaning they were once subject to the preclearance regime of Section 5, but successfully obtained a declaratory judgment under Section 4 and thus were no longer subject to preclearance.

Hours after *Shelby County* was decided, states moved to enact restrictive voting laws. Texas revived a previously blocked voter ID law. Within days, Alabama announced it would move to enforce a photo ID law it had previously refused to submit to the DOJ for preclearance. Within months, New York broke from past practices and declined to hold special elections to fill 12 legislative vacancies, denying representation to 800,000 voters of color.

Less than two months after the Supreme Court struck down the preclearance provisions, North Carolina state legislators wasted no time passing an omnibus "monster law." State Senator Tom Apodaca (then-Chairman of the North Carolina Senate Rules Committee) said the State did not want the "legal headaches" of having to go through preclearance if it was not necessary to determine which portions of the proposal would be subject to federal scrutiny. "so, now we can go with the full bill," he added. He predicted at the time that an omnibus voting bill would surface in the Senate the next week that could go beyond voter ID to include issues such as reducing early voting, eliminating Sunday voting, and barring same-day voter registration.

This pattern continued, and in 2016, 14 states had enacted new voting restrictions for the first time in a presidential election, including previously covered states such as Alabama, Arizona, Mississippi, South Carolina, Texas, and Virginia. In 2017, two additional states, Arkansas and North Dakota, enacted voter ID laws. In 2018, Arkansas, Indiana, Montana, New Hampshire, North Carolina, and Wisconsin enacted new restrictions on voting, ranging from restrictions on who can collect absentee ballots, to cuts to early voting, restrictions on college students, and enshrining voter ID requirements in a state constitution. In 2019, Arizona, Florida, Indiana, Tennessee, and Texas enacted new restrictions. As of the end of 2019, the Brennan Center for Justice ("Brennan Center") reported that, since 2010, 25 states had enacted new voting restrictions, including strict photo ID requirements, early voting cutbacks, and registration restrictions.

A new wave of voter suppression bills has emerged in the wake of the 2020 general election, with restrictive voting bills being signed into law in at least 18 states at the time of this writing.

Despite the Court's decision, several key provisions of the VRA remain in place. For example, the language access requirements contained in Sections 4(e), 4(f)(4), 203, and 208 remain intact. Section 2 is also a key enforcement mechanism for the DOJ and outside litigators to protect voting rights nationwide. Section 2 of the VRA applies a nationwide prohibition against the denial or abridgment of the right to vote on the basis of race or color and was later amended to include language minorities.

Since the *Shelby County* decision invalidated the coverage formula for preclearance, voting rights groups, litigators, and the Department of Justice are left to file lawsuits arguing that voting changes would discriminatorily reduce minority citizens' ability to cast a ballot or elect candidates of their choice—a remedy that is in many ways inadequate to fully protect the right to vote. Voters and advocates are forced to reactively fight to protect the right to vote, rather than states and localities having to prove prior to implementation that their laws will not discriminate against protected classes of voters.

On July 1, 2021, the Supreme Court held in *Brnovich v. DNC* that Arizona's laws restricting third-party ballot return and out-of-precinct voting were lawful and did not violate Section 2's ban on discriminatory effect in voting, nor were they enacted with discriminatory purpose. In doing so, Justice Samuel Alito, writing for the majority, articulated an entirely new standard for reviewing Section 2 vote denial claims, weakening one of the last pillars of the VRA and fail-safes against discriminatory voting laws. Justice Alito held that, "the mere fact that there is some disparity in impact," is now no longer dispositive, but rather, "the size of the disparity matters." Further, Justice Alito provided that, "courts must consider the opportunities provided by a State's entire system of voting when assessing the burden imposed by a challenged provision"—rather than evaluating the provision on its individual merits. Finally, Justice Alito went a step further, stating that, "prevention of fraud" is a "strong and entirely legitimate state interest," even if there is no evidence of fraud having ever occurred, and that rules that are supported by strong state interests are, "less likely to violate" Section 2.

In writing for the dissent in *Brnovich*, Justice Elena Kagan admonished the majority for weakening a seminal statute and creating its own standard and set of guideposts where one did not exist in the statute. Justice Kagan stated:

"Today, the Court undermines Section 2 and the right it provides. The majority fears that the statute Congress wrote is too 'radical'—that it will invalidate too many state voting laws. So the majority writes its own set of rules, limiting Section 2 from multiple directions. Wherever it can, the majority gives a cramped reading to broad language. And then it uses that reading to uphold two election laws from Arizona that discriminate against minority voters . . . What is tragic here is that the Court has (yet again) rewritten—in order to weaken—a statute that stands as a monument to America's greatness, and protects against its basest impulses."

Justice Kagan argued that the majority had strayed far from the text of Section 2 in its ruling, its analysis permitting, "exactly the kind of vote suppression that Section 2, by its terms, rules out of bounds."

THE SUBCOMMITTEE ON ELECTIONS INVESTIGATION OF CURRENT DISCRIMINATION IN VOTING

In exercising Congress's authority and jurisdiction over federal elections, the Committee on House Administration ("Committee") has broad jurisdiction under Rule X of the Rules of the House to oversee the administration of federal elections. In exercising that jurisdiction, Speaker of the House Nancy Pelosi (D-Calif.) and Committee Chair Zoe Lofgren (D-Calif.) reconstituted the Committee on House Administration's Subcommittee on Elections ("Subcommittee") at the outset of the 116th Congress.

Subsequently, spanning the leadership of then-Subcommittee Chair Marcia L. Fudge (D-Ohio) and current Chair G. K. Butterfield (D-N.C.), the Subcommittee embarked during the 116th and 117th Congresses to hold more than a dozen hearings to collect the contemporaneous evidence and data called for by Chief Justice Roberts and the Court's majority in *Shelby*.

In building upon investigatory hearings conducted in the 116th Congress, in the 117th Congress the Subcommittee identified the practices with what appeared to be the most abundant evidence of discriminatory impact on minority voters and endeavored to examine those practices in greater detail.

Across the Subcommittee's five hearings, the Subcommittee received testimony from more than 35 witnesses, gathering and examining evidence of ongoing discrimination in the election practices of: (1) voter list maintenance and voter purges; (2) voter identification and documentary proof-of-citizenship laws; (3) lack of access to multi-lingual voting materials and assistance; (4) polling place closures, consolidations, relocations, and long wait times; (5) restrictions on opportunities to vote; and (6) changes to method of elections, jurisdictional boundaries, and redistricting. Furthermore, the Subcommittee examined the state of voting rights enforcement and protection in the post-*Shelby County* era.

The practices examined are perennial barriers faced by voters. According to testimony from Marcia Johnson-Blanco of the Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee"), during the 2020 General Election cycle, the top issues raised through the organization's nationwide, non-partisan voter protection program included, "questions and concerns about mail-in and absentee ballots, as well as voter ID and registration . . . Election Day also brought calls of polling place accessibility issues, and concerning calls complaining of voter intimidation and electioneering." The Subcommittee's lengthy proceedings and examination revealed that each of the practices identified impose significant, discriminatory burdens on minority voters.

The evidence before the Subcommittee includes locality- and state-specific, as well as nationwide, studies demonstrating that the election practices examined impose a variety of discriminatory burdens, ranging from disproportionately decreased registration and turnout among minority voters, disproportionately high costs to register and cast a ballot, disproportionately increased risk that a ballot will be thrown out, and a disproportionate dilution of voting power. The record also includes extensive testimony from litigators and voting rights practitioners who confront these discriminatory voting laws and practices on a regular and increasingly frequent basis in courtrooms, governmental proceedings, and on voting days.

As Debo Adegbile, Partner at Wilmer Hale, LLC and Member of the U.S. Commission on Civil Rights, noted in his testimony before

the Subcommittee, the expansion of the franchise has routinely been met with resistance:

“We currently stand at an inflection point, but it is not unprecedented. The Fifteenth Amendment’s expansion of the right to vote was met with the creation of poll taxes and literacy tests. The rise of minority voting power after the Voting Rights Act was met with the expansion of at-large elections. The National Voter Registration Act (i.e., the Motor Voter Law) and the narrow margin of the 2000 presidential election were answered by a wave of spurious voter ID laws. Now, record voter turnout, despite a pandemic, is almost predictably sparking renewed efforts to make it even harder to vote.”

While states have been enacting discriminatory, restrictive voting laws in the years since Shelby County, that effort has significantly increased in response to the largest voter turnout in 120 years experienced in the 2020 General Election.

According to the Brennan Center, as of July 14, 2021, lawmakers had introduced more than 400 bills in 49 states to restrict the vote. This is at least four times the number of restrictive bills introduced just two years prior, with at least 18 states having enacted new laws containing provisions that restrict access to voting. A Brennan Center report from May 2021 states that, “[t]he United States is on track to far exceed its most recent period of significant voter suppression—2011. By October of that year, 19 restrictive laws were enacted in 14 states. This year, the country has already reached that level, and it’s only May.”

Michael Waldman, President of the Brennan Center for Justice, noted in his testimony before the Subcommittee that these bills were introduced with the intention of rolling back voting rights, observing that, “[c]rucially, these are not backbenchers tossing a bill in the hopper in the hope of getting a good day on Twitter.” Indeed, as of June 21, 2021, 17 states have enacted 28 new laws that restrict access to the vote. Moreover, Mr. Waldman testified that “[a]s in previous eras, these laws and proposals purport to be racially neutral,” yet, “[i]n fact, often they precisely target voters of color.”

Congress has a long history of exercising its legislative authority and constitutional powers to legislate to protect access to the franchise. In the eight years since Shelby County was decided, Congress has failed to act on what has historically been a bipartisan endeavor—ensuring every American has an equal and equitable opportunity to cast a ballot and participate in democracy. As Justice Kagan notes in her dissent in *Brnovich*, “[i]ndeed, the problem of voting discrimination has become worse since that time—in part because of what this Court did in Shelby County. Weaken the Voting Rights Act, and predictable consequences follow: yet a further generation of voter suppression laws.”

This report and the record compiled by the Subcommittee illustrate the urgent need for action.

CHAPTER TWO—DISCRIMINATORY PRACTICES IN VOTING: AN OVERVIEW

Since the Supreme Court decided *Shelby County v. Holder* in 2013, states across the country have enacted voting laws and election administration policies that restrict access to the ballot in a discriminatory and suppressive manner, one that disproportionately impacts minority voters.

Over the last two Congresses, the Subcommittee on Elections of the Committee on House Administration undertook an extensive fact-finding series of hearings to study and understand the extent to which all vot-

ers across the United States have access to, or face barriers to, the ability to cast their ballot freely and fairly. Tellingly, with respect to the voting and election administration practices examined by the Subcommittee, the variety of sources examined, and testimony gathered all point to the same conclusion—the record demonstrates that the election administration laws and practices at issue disproportionately burden minority voters, denying many the free and equal access to the vote guaranteed by Federal law and the Constitution.

During the 116th Congress, the Subcommittee cast a wide evidentiary net, examining all manner of election administration and voting laws to identify which, if any, practices discriminate against minority voters. In doing so, the Subcommittee held eight hearings and a listening session, called more than 60 witnesses, gathered several thousand pages of testimony, documents, and transcripts, and received hours of oral testimony. Throughout those hearings, the Subcommittee found extensive evidence of numerous practices that do, or have the potential to, discriminate and suppress access to the ballot, culminating in a report released in November 2019 entitled *Voting Rights and Election Administration in the United States of America*.

The barriers to voting faced by millions of Americans did not subside in the 2020 election—in many instances they were, in fact, exacerbated. During the first six months of the 117th Congress, building upon the record built in the 116th Congress, the Subcommittee on Elections, under the leadership of Chairman G. K. Butterfield (D-N.C.) identified a key subset of issues explored in the prior Congress that exhibited the most substantial evidence of disproportionate and discriminatory impact on voters, particularly minority voters, for further, in-depth examination.

Over the course of five hearings, the Subcommittee conducted a substantive examination of the issues of: (1) discriminatory voter list maintenance practices and voter purges; (2) the discriminatory impact of voter ID and documentary proof-of-citizenship requirements; (3) the ongoing lack of access to multi-lingual voting materials and assistance; (4) the disparate impact of polling place closures, consolidations, relocations, and wait times at the polls; (5) restrictions on additional opportunities to vote; and (6) changes to methods of election, jurisdictional boundaries, and redistricting. In concluding the evidence gathering process, the Subcommittee examined the national landscape of voting rights in America in the eight years since the Supreme Court struck down one of the key pillars of the VRA.

Importantly, the evidence detailed in this report is “current,” as called for by Chief Justice Roberts and the Court’s majority in *Shelby*. This report examines a substantial body of evidence, the vast majority of which derives from elections and legislative sessions conducted in the last 10 years, with much of the evidence relating to elections occurring within the years post-*Shelby County*.

Over the course of testimony received from more than 35 witnesses and numerous hours of hearings, not only did the Subcommittee find substantial evidence that the election administration and voting practices examined throughout the hearings and in this report have a discriminatory effect on minority voters, but Members also found substantial evidence that there is a significant risk these discriminatory effects are the product of a discriminatory purpose. The extensive evidence recounted throughout this report, that the burdens of the election administration laws and practices, “bears more heavily

on one race than another,” is illustrative of the laws’ and practices’ discriminatory purpose. Additionally, as is noted in the discussion of some voting laws and practices later in this report, courts have looked at whether voting is “racially polarized,” which provides a controlling party disfavored by minority voters with, “an incentive for intentional discrimination in the regulation of elections” in determining when a practice is discriminatory and have found some of the practice examined by the Subcommittee to fit this set of circumstances.

However, consistent with the Court’s admonition that Congressional factfinders must consider a variety of facts and circumstances in determining whether a law had its genesis in its discriminatory purpose, the Subcommittee looked beyond evidence of solely discriminatory effect in finding that there is a high risk these laws and practices are attributable to a discriminatory purpose. The background and context of many of the laws were suggestive of a discriminatory purpose. Many were enacted in the immediate or near aftermath of the Shelby County decision on party-line votes in previously covered jurisdictions with a well-documented history of racially polarized voting—others had already been rejected by the Department of Justice under the Section 5 preclearance regime.

Further, public officials and election administrators made troubling statements regarding some of the laws and practices at issue that bear the hallmarks of discriminatory purpose. The Subcommittee also found evidence that some states and localities knew the laws would have discriminatory effects, but enacted them nevertheless, without including safeguards to protect the interests and rights of minority voters, as is illustrated in some of the examples discussed throughout this report. Additionally, states and localities provided unsupported or pretextual race-neutral justifications for many of the laws and practices. Several of the laws and practices were enacted just as minority groups disproportionately burdened by the voting laws or practices were gaining political influence.

The Subcommittee is not alone in finding that there is a significant risk that the laws and practices discussed in this report pose a high risk of being enacted for a discriminatory purpose. Based on some of the evidence described above and throughout this report, courts have found several of these laws were enacted with discriminatory intent or otherwise violated Federal law or the Constitution.

Section 2 of the Voting Rights Act has proved a powerful, but inadequate tool for protecting the right to vote and access to the ballot in the post-*Shelby* era. Section 2 authorizes private actors and the Department of Justice to challenge discriminatory voting practices in the federal courts. As Janai Nelson, Associate Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc. (“NAACP Legal Defense Fund” or “LDF”) stated in testimony before the Subcommittee:

“Section 2 applies nationwide and places the burden on voters harmed by voting discrimination to bring litigation to challenge a law that has discriminatory results and/or discriminatory purpose. Section 2’s ‘permanent, nationwide ban’ on racially discriminatory dilution or denial of the right to vote is now the principal tool under the VRA to block and remedy these new discriminatory measures.”

Ms. Nelson testified that, “there have been at least nine federal court decisions finding that states or localities enacted racially discriminatory voting laws or practices intentionally, for the purpose of discriminating

against Black voters, Latino voters, or other voters of color.” Ms. Nelson testified further that, “litigation is slow and costly—and court victories may come only after a voting law or practice has been in place for several election cycles.” The parties engaged in litigation often spend millions of dollars litigating these cases, they take up significant judicial resources, and the average length of Section 2 cases is two to five years.

While court cases are ongoing, numerous elections for the Presidency, Congress, state, and local government seats may have come and gone. Thomas Saenz, President and General Counsel of the Mexican American Legal Defense and Educational Fund (“MALDEF”) stated in his testimony that, “[t]here is simply no way that non-profit voting rights litigators, even supplemented by the work of a reinvigorated Department of Justice Civil Rights Division, could possibly prevent the implementation of all of the undue ballot-access restrictions and redistricting violations that are likely to arise in the next two years.”

The evidence is clear: lawsuits filed under Section 2 and other provisions of law and the Constitution cannot and do not substitute for proactive protections of voting rights and cannot serve as the sole vanguard against discriminatory voting and election administration practices. Additionally, the Supreme Court’s recent decision in *Brnovich v. DNC* likely makes it harder for voting rights litigators and the Department of Justice to protect the right to vote through Section 2 litigation.

The November 2020 general election saw record-setting voter turnout, with over 158 million ballots cast and the highest turnout as a percent of the voting eligible population in 120 years. While some may cite recent voter registration and voter turnout numbers as alleged examples and evidence that the effects of *Shelby* have been minimal, those numbers alone do not tell the whole story. For example, Dr. Matt Barreto of the UCLA Latino Policy and Politics Initiative stated in testimony before the Subcommittee that, “[s]ingular focus on turnout without centralizing the real impact of such burdens on access to the franchise is one-dimensional, operating within the subtext of racial power to reproduce the inequalities that demand the attention of political scientists in the first place.” As the evidence before the Subcommittee clearly demonstrates, record turnout, and voter turnout generally, does not discredit or discount the existence of barriers to accessing the franchise.

Additionally, state legislatures across the country have responded to the increase in voter participation not with more or sustained access to the ballot, but with false claims of fraud, election irregularities, and perpetuation of the “Big Lie” that the 2020 election was somehow rigged and stolen. The ongoing epidemic of misinformation and disinformation in our elections does not only polarize the electorate and fuel attempts to legislate voter suppression, but it also targets and suppresses minority votes. As Spencer Overton, President of the Joint Center for Political and Economic Studies testified before the Subcommittee in 2020, the disinformation targeted at Black voters, for example, on social media platforms in the 2016 election cycle continued in the 2020 cycle. Mr. Overton testified that both foreign and domestic actors, “used online disinformation to target and suppress Black votes.” Additionally, a report from NPR in the final days of the 2020 election found that Black and Latino voters were flooded with disinformation in the final days of the 2020 election with an unmistakable intent to depress turnout among minority voters.

The spread of mis- and disinformation only continued with false claims of unlawful ballots being cast and widespread fraud—much of which was alleged to be in areas where large numbers of ballots were cast by minority voters. These claims have all been repeatedly disproven, yet states are using them as false pretenses to push forward an onslaught of new voting laws designed to make it harder for voters to participate in future elections, laws that will disproportionately and discriminatorily impact the ability of minority voters to cast a ballot.

As Wade Henderson, Interim President and CEO of the Leadership Conference on Civil and Human Rights (“The Leadership Conference”) testified:

“The assault on our freedom to vote has only grown more dire. After historic turnout, politicians peddled lies, tried to discount the votes of communities of color, and attempted to override the will of the people. . . . Now they have doubled down on attempts to reshape the electorate for their own gain. . . . These restrictions disproportionately burden voters of color. They resemble the very strategies that led Congress to adopt the Voting Rights Act in the first place.”

The evidence before the Subcommittee is conclusive—the practices discussed below, and the manner in which they are implemented, are wielded with both discriminatory intent and effect, unlawfully erecting barriers to the ballot for minority voters across the country. The voting discrimination acknowledged by Chief Justice Roberts in *Shelby* does still exist. It is the conclusion of the Subcommittee’s hearings and this report that these practices warrant stricter protections to ensure every voter has unfettered access to the ballot promised to them under the Constitution and Federal law.

CHAPTER THREE—VOTER LIST MAINTENANCE PRACTICES AND THE PURGING OF ELIGIBLE VOTERS

BACKGROUND

Voter purging is often performed under the guise of routine voter list maintenance. Some argue that opponents of voter purges are preventing state and local election officials from preforming necessary, mandated list maintenance. Proponents of voter purging often raise the specter of deceased persons or voters who have moved remaining on the rolls, of “bloated” voter rolls, or insidious claims of non-citizens being on the rolls, leading to voter fraud. However, there is no credible evidence of widespread voter fraud in American elections. For example, a comprehensive analysis published by the *Washington Post* found only 31 credible instances of voter fraud between 2000 and 2014—out of one billion ballots cast.

List maintenance is the law of the land and the process by which state and local governments remove ineligible voters from their voting rolls. The National Voter Registration Act (“NVRA”), or “motor voter” law, is the principal federal statute governing state maintenance of voter registration rolls. The NVRA was signed into law on May 20, 1993, by President Bill Clinton, following decades of efforts to establish a national voter registration system to address low voter turnout and increase voter registration opportunities that began soon after passage of the VRA in 1965. Enacted pursuant to Congress’s authority under the Elections Clause, the NVRA governs voter registration procedures for federal elections. Nevertheless, nearly all states use the NVRA-prescribed process for maintaining their voter rolls for both state and federal elections.

In addition to establishing voter registration procedures, the NVRA provides that “each State shall . . . conduct a general pro-

gram that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of— (A) the death of the registrant; or (B) a change in the residence of the registrant. . . .” The NVRA provides that any, “program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter roll for elections for Federal office” must meet two requirements. First, the program or activity must be, “uniform, non-discriminatory, and in compliance with the Voting Rights Act of 1965.” Second, the program or activity must “not result in the removal of any person from the official list of voters registered to vote in an election for Federal office by reason of the person’s failure to vote,” unless certain conditions are satisfied.

The NVRA describes one form of “voter removal program[]” that states may use to remove voters (referred to in the statute as “registrants”) who have moved to an address outside of a jurisdiction. In particular, states can use, “change-of-address information supplied by the Postal Service . . . to identify registrants whose addresses might have changed.” A state may not remove a registrant from its voter rolls on grounds that the registrant has changed residence unless the registrant does one of two things: (1) confirms in writing that the registrant has changed residence to a place outside the jurisdiction or (2) it “appears” from information provided by the Postal Service that the registrant has moved to a different address in a different jurisdiction and a “notice” procedure is used to “confirm” that the registrant has, in fact, changed address to a new jurisdiction. Under the notice procedure, a state must send a postage pre-paid and pre-addressed return card notifying the registrant of certain rights and obligations, and allowing a registrant to provide the state with the registrant’s current address. If a registrant fails to respond to the notice, the state may, but is not required to, remove the registrant only if the registrant fails to vote in two federal elections after the date of the notice.

A second federal law governing state voter registration lists—the Help America Vote Act of 2002 (“HAVA”), passed in the wake of the 2000 Presidential election—mandates the creation of statewide voter registration databases for all elections to federal office that include the “name and registration information of every legally registered voter in the State.” HAVA requires that the database be created and maintained in a “uniform and nondiscriminatory manner.” HAVA requires that state or local officials perform “list maintenance” on a “regular basis” in accordance with the provisions in the NVRA. For the purposes of identifying felons and deceased individuals subject to removal, HAVA requires that the state coordinate with state agencies maintaining records on felony status and death.

HAVA further requires that states implement, consistent with NVRA, systems “of file maintenance that make[] a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters,” under which “registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed solely by reason of a failure to vote.”

When done improperly, voter list maintenance and voter purges disenfranchise otherwise eligible voters, use unreliable practices and data that disproportionately sweep in, and ultimately disenfranchise minority voters, often occurring too close to an election

for a voter to correct the error if registration deadlines have passed. Practices of voter purging have raised serious concerns in recent years.

THE DISPROPORTIONATE AND DISCRIMINATORY BURDEN AND IMPACT OF LIST MAINTENANCE PRACTICES ON MINORITY VOTERS

Evidence received by the Subcommittee demonstrates that misconceived voter list maintenance efforts have erroneously sought to remove hundreds of thousands of properly registered voters and, in doing so, disproportionately burdened minority voters.

Following the Shelby County decision, several states, including those previously covered by Section 5 preclearance, have removed millions of registered voters from their voter rolls. As Michael Waldman, President of the Brennan Center for Justice, stated in his testimony before the Subcommittee, “abusive purges can remove duly registered citizens, often without their knowledge.” Mr. Waldman further testified that, “purges have surged in states once subject to federal oversight under the VRA . . . states once covered by Section 5 saw purges at a 40 percent higher rate than the rest of the country.”

The Brennan Center reports that more than 17 million voters were removed from the rolls nationwide between 2016 and 2018. In testimony during the 116th Congress, Mr. Waldman noted that the purge rate outpaced growth in voter registration (18 percent) or population (6 percent) and that the Brennan Center had calculated that two million fewer voters would have been purged between 2012 and 2016 if jurisdictions previously covered by Section 5 of the Voting Rights Act had purged their voter rolls at the same rate as other non-covered jurisdictions. Kevin Morris, Researcher with the Brennan Center, stated in his testimony before the Subcommittee that:

“Put differently, this means that the end of the preclearance condition did not result in a one-time ‘catch-up’ of voter list maintenance, but rather ushered in a new era in which the voter list maintenance practices of formerly covered jurisdictions were substantially more aggressive than other demographically-similar jurisdictions that were not covered under the VRA. . . . Simply put, Shelby County allowed and effected increased voter purges in counties with demonstrated histories of racially discriminatory voting rules.”

In several recent cases, states were found to have improperly sought to remove properly registered voters. For example, after the State of Wisconsin identified 341,855 registrants as potentially subject to removal on the basis of having moved, thousands of individuals showed up to vote in the following election at their address of registration, indicating that Wisconsin had improperly flagged such registrants as likely movers. Joshua Kaul, Attorney General for the State of Wisconsin testified that, of the voters initially listed on the “movers report,” over 6,000 voters responded to the postcards sent out to the potential “movers” and therefore kept their registration active, however, many more were erroneously deactivated and left off the poll book even though they had not moved. Attorney General Kaul further testified that, during the 2018 Spring Primary, Wisconsin Elections Commission staff reported that, “while available data from the DMV implied many had moved, some of the voters, in fact, had not moved,” and that “[o]verall, 12,133 [voters] were proactively reactivated by staff or were stopped from being deactivated due to these data discrepancies.” A study of Wisconsin’s process found that at least four percent of the registrants who were identified as poten-

tial movers and who did not respond to a subsequent postcard cast a ballot at their address of registration, with minority registrants twice as likely as white registrants to do so.

The State of Arkansas moved to purge nearly 8,000 voters from the rolls on grounds that they were ineligible to vote due to a felony conviction—in Arkansas, those who have been convicted of a felony lose their right to vote until their sentence is completed or they are pardoned. In actuality, however, the list included a high percentage of voters who were indeed eligible and, in fact, some had never been convicted of a felony or had had their voting rights restored.

Thomas Saenz of MALDEF noted in his testimony before the Subcommittee that, “MALDEF and others also had to challenge an attempt to purge thousands of naturalized Texans, who were targeted through Motor Vehicles data that the state knew were outdated and would not reflect recent naturalizations.” Texas erroneously tried to remove tens of thousands of voters on grounds that they were non-citizens. Evidence subsequently showed that virtually all the registrants targeted by the effort were, in fact, citizens eligible to vote.

Additionally, an analysis conducted by a non-partisan group found that, of the more than 300,000 registrants Georgia purged in 2019 for having changed residence, 63.3 percent still lived at the residence identified on the voter registration. The analysis found the Georgia erroneously purged nearly 200,000 voters from its rolls.

In many cases, the percentage of voters from racial or language minority groups subject to removal under these recent, large-scale, and often errant, voter roll purge efforts exceeded such groups’ representation in the overall population. For example, in 2012 the State of Florida created a list of 182,000 registrants potentially subject to purge on the grounds that the registrants were non-citizens. The percentage of registrants included in the list that were Hispanic (61 percent) substantially exceeded the percentage of Hispanics in Florida’s overall population (16 percent). Litigation in the case of *Mi Familia Vota Education Fund v. Detzner* showed that this change should have been submitted for preclearance as a statewide change impacting formerly covered counties in Florida under Section 5. NAACP LDF’s *Democracy Diminished* report noted that a 2018 report found that since 2016, Florida has purged more than seven percent of voters.

Likewise, mailers initiating the Wisconsin voter purge effort were disproportionately sent to counties with disproportionately large Black and Latino populations. According to Demos, while the Black voting population comprises only 5.7 percent of Wisconsin’s total electorate, “the highest concentrations of 2019 ERIC mailers were sent to areas that are home to the largest Black voting population in Wisconsin.” Demos reported that over one-third of the mailers sent to voters on the 2019 ERIC list went to the two counties where the vast majority of Wisconsin’s Black voters reside—Milwaukee and Dane—two counties that are home to three quarters of Wisconsin’s Black voters.

A 2016 analysis of an Ohio removal effort found that the effort disproportionately removed voters in in-town African American neighborhoods relative to predominantly white suburbs—“in predominantly African American neighborhoods around Cincinnati, 10 percent of registered voters had been removed due to inactivity in 2012, compared to just 4 percent in the suburban Indian Hill.” And a purge of registrants in Brooklyn, New York, removed 14 percent of voters in Hispanic-majority districts compared to 9 percent of voters in other districts.

Several approaches states have taken to culling voter rolls have been shown to disproportionately remove properly registered minority voters. To begin, a number of states, including Florida, Georgia, Iowa, Minnesota, Tennessee, and Texas, have sought to remove registrants on the basis that they were non-citizens, often using state and federal databases that can contain inaccurate information. To identify non-citizen registrants, for example, Florida used its Department of Motor Vehicles (“DMV”) and the federal Systematic Alien Verification for Entitlements (“SAVE”) databases and sought to match citizenship information in those databases with its voting rolls.

As explained in the Subcommittee’s prior report, the SAVE database is used at times to verify immigration status when an individual interacts with a state—however, SAVE does not include a comprehensive and definitive listing of U.S. citizens and states have been cautioned against using it to check eligibility. Drivers’ license databases have also proven to be inaccurate for verifying voter registration lists.

According to the U.S. Commission on Civil Rights’ (“USCCR”) 2018 report, the list of 182,000 registrants was created by comparing the voting rolls to drivers’ license databases, “which is an extremely faulty method as drivers’ license databases do not reflect citizenship,” and was then cut back to approximately 2,600. Because, among other reasons, DMV records and SAVE databases are not generally updated to remove subsequently naturalized individuals, Florida’s reliance on those databases to identify voters subject to being purged erroneously identified numerous registrants as non-citizens, the vast majority of whom were Latino, Hispanic, or Black. For example, of the 1,572 individuals that were notified by Miami-Dade County that they were potentially subject to purge as identified non-citizens, 98 percent of the respondents (549 out of 562) provided evidence that they were citizens and eligible to vote.

Similarly, Texas used DMV records to try to identify non-citizens to remove from its voting rolls. Texas officials initially claimed that the DMV matching effort identified 95,000 non-citizens as registered to vote (58,000 of whom had voted in the previous election). However, because the DMV data did not account for subsequently naturalized citizens, the effort erroneously flagged thousands of individuals who were lawfully registered to vote. In Harris County, Texas, alone, approximately 60 percent of the voters flagged for removal produced evidence confirming their citizenship and entitlement to vote.

An audit of a sample of the remaining registrants identified by the DMV database matching effort as “non-citizens” yielded no non-citizens. Because over 87 percent of Texas’ naturalized citizens are Black, Latino, or Asian, these falsely identified non-citizens were overwhelmingly minority voters. Sonja Diaz, Founding Executive Director of the Latino Policy and Politics Initiative at the University of California, Los Angeles (“UCLA LPPI”) notes in her testimony that, “[t]he disingenuous targeting of naturalized voters was not unique to Texas, but also found in 16 states where inaccurate immigration data identified and purged rightfully registered Latino voters.”

The NAACP Legal Defense Fund’s report *Democracy Diminished* noted an additional example of attempts to wrongfully or inaccurately purge voters from the voting rolls, such as in Alabama when, in 2012, parties entered into a partial consent agreement to resolve issues under Section 5 of the VRA and blocked the City of Evergreen from continuing to implement an un-precleared discriminatory voter purge based on utility

records that omitted eligible voters from a voter registration list, “including nearly half of the Caneuh County registered voters who reside in districts heavily populated by Black people.”

Additionally, several states have relied, or tried to rely, on multi-state databases—Interstate Voter Registration Crosscheck (“Crosscheck”) and Electronic Registration Information Center (“ERIC”)—to identify registrants who allegedly moved to a different state, and therefore were allegedly subject to removal.

Crosscheck, a joint venture of as many as 29 states, was created by former Kansas Secretary of State Kris Kobach to identify voters registered in more than one state. The Crosscheck program sought to do so by comparing voter registration lists from participating states and flagging all records that have the same first and last name, and date of birth.

Quantitative studies have shown that Crosscheck is an unreliable basis for identifying voters registered in multiple jurisdictions because of the small number of data points it uses to identify “duplicate” registrations—many people share the same first and last name and the same birthday. In other words, “a substantial share of the pairings returned to states by Crosscheck [as duplicate registrations] represented cases in which two different registrants shared the same first name, last name, and date of birth instead of the same person being registered in to vote in two different states.”

The states which used Crosscheck to identify duplicate registrants should have known this—Crosscheck’s, “user manual specifically states that ‘a significant number of apparent double votes are false positives and not double votes.’” The accuracy of Crosscheck was also undermined by its use of unreliable registration dates and other data entry errors. Sophia Lin Lakin, Deputy Director of the Voting Rights Project at the American Civil Liberties Union (“ACLU”) notes in her testimony that:

“A study by a team of researchers at Stanford, Harvard, the University of Pennsylvania, and Microsoft found that using Crosscheck to purge the voter rolls in one state, ‘could impede approximately 300 legitimate votes for each double vote prevented.’” In other words, the system incorrectly flags people as potential double voters (“matches”) more than 99% of the time because of false positives resulting from poor matching protocols.”

Crosscheck’s high error rate and heavy reliance on first and last names to identify duplicate registrants increases the likelihood that properly registered minority voters are subject to removal proceedings at a higher rate than properly registered white voters. As Ms. Lakin explained to the Subcommittee:

“Among some minority populations, first-name naming conventions are more commonly used, and many individuals born around the same historical periods are given the same name. Many often share the same or similar last names. Latinx voters, for example, are more likely than white voters to have one of the most common 100 surnames in the country. Indeed, existing studies show that incorrect matches using such a methodology are disproportionately concentrated among minority voters. Crosscheck flagged one in six Latinx Americans, one in seven Asian Americans, and one in nine African Americans as potential double registrants.”

Several states have aggressively sought to purge voters using data they knew or should have known would errantly lead to the removal of properly registered voters. For example, an election official in Kansas—the State that created and managed

Crosscheck—contemporaneously admitted that most of the “duplicate” registrations identified by Crosscheck were not the result of fraud, but instead reflected data entry errors, writing in an email disclosed in litigation that, “[i]n the majority of cases of apparent double votes, in the end they do not turn out to be real double votes due to poll worker errors, mis-assignment of voter history, voters signing the wrong lines in poll books, etc.”

Other states participating in Crosscheck were also aware of its high error rate. A 2013 report by the Virginia State Board of Elections, for example, found that, after conducting “quality control for verifying . . . data matches . . . only 57,000 of the 308,579” registrations identified by Crosscheck as “duplicates” in fact warranted initiation of cancellation efforts, meaning that Virginia independently determined that Crosscheck’s error rate likely exceeded 75 percent.

Likewise, Indiana twice used database records to purge “duplicate” registrants from its voting rolls, and in doing so failed to comply with the NVRA. Indiana’s first voter purge effort used data from Crosscheck—which, as explained above, is known to include numerous errors and disproportionately identify minority voters as having moved—to purge voters without providing affected registrants notice of the removal efforts. Empirical evidence presented to the district court revealed that “Indiana’s use of Crosscheck data likely triggered list-maintenance against thousands of eligible registrants who continued to reside at their address of registration, but who had the misfortune of sharing the same first name, last name, and date of birth of a registrant in another Crosscheck member state.”

The U.S. Court of Appeals for the Seventh Circuit held that Indiana’s voter purge program violated the NVRA by removing voters who were suspected of changing residence without adhering to the NVRA’s notice requirements. Notwithstanding that its previous purge effort had been found to be unlawful, Indiana embarked on a second voter purge effort using a proprietary database that a federal court found was, “functionally identical to Crosscheck.” The district court again concluded that the renewed voter roll purge effort violated the NVRA for the same reason—Indiana was seeking to purge voters using database information without adhering to the NVRA’s notice-and-waiting procedure.

Crosscheck is no longer a widely used system amongst states because of its abuses and inaccuracies. Ms. Lakin testified that the system has been on hold since a 2019 settlement in a case brought by the ACLU of Kansas, “on behalf of 945 voters whose partial Social Security numbers were exposed by Florida officials through a public records request” and it has not been used since, “a Homeland Security audit discovered security vulnerabilities in 2017.” The failures and abuses of Crosscheck demonstrate how list maintenance processes and databases can be abused and lead to erroneous and disproportionate purging of minority voters from the voting rolls.

ERIC is another voter list maintenance tool which is used by 30 states and the District of Columbia to maintain their voter rolls. Whereas Crosscheck used just two datapoints to identify “duplicate” registrations, ERIC uses more information to identify duplicates, including DMV information and Postal Service change of address data. The 31 jurisdictions participating in ERIC have agreed to send postcards to registrants flagged by ERIC as duplicates to confirm their registrations, the first step in removing such registrants from voting rolls.

Though ERIC is generally viewed as more reliable than Crosscheck, it too has room for

improvement and can disproportionately impact minority voters. As first noted above, a 2021 study of Wisconsin registrants flagged by ERIC as potentially subject to removal based on a change of address found that approximately four percent of the voters flagged as having moved subsequently voted at their address of registration, meaning that for every 29 registrations ERIC identified as having moved, at least “one registrant continued to reside at their address of registration and used that address to cast a ballot” in the next election.

Notably, the study found that registrants who were Black and Hispanic were significantly more likely to be falsely identified by ERIC as having moved than White registrants, meaning that, “the lower bound on the false mover error rate is more than 100% larger for minorities than for whites.” In other words, the study found that ERIC erroneously identified Black and Hispanic voters as subject to removal at twice the rate at which it erroneously identified White voters as subject to removal. The authors identified minority registrants’ disproportionate likelihood of living in a multi-unit or larger household dwellings (and, therefore, a likely relatively more frequent rate of change of residence within a single jurisdiction) as likely causes for their erroneous identification as subject to purge.

Summarizing the literature on the use of databases to identify duplicate registrants, Dr. Marc Meredith of the University of Pennsylvania—who has published papers analyzing both Crosscheck and ERIC—testified that research “demonstrates that minority registrants are more likely than White registrants to be incorrectly identified as no longer eligible to vote at their address of registration.” Given that the majority of states use databases like Crosscheck and ERIC to identify voters for removal, the discriminatory burdens imposed by use of the databases extend throughout much of the United States.

Ms. Lakin also provided testimony to the Subcommittee on the dangers of “mass voter challenges.” According to her testimony, state “challenger laws”—laws that allow private citizens to challenge the eligibility of prospective voters on or before Election Day—have also been used to remove voters from the rolls en masse. These laws have been used to target voters along race, class, and disability lines. As Ms. Lakin explains, “[m]ass challenges are tantamount to a systemic purge, but can be exploited to avoid federal rules governing purge programs, such as the prohibition of systemic removals of voter registrations within 90 days of a federal general election” and can deprive or attempt to deprive thousands of their voting rights.

Furthermore, a 2020 report published by the Native American Rights Fund (“NARF”), *Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters*, highlighted the impact voter purges have on Native American voters. The NARF report details how the non-traditional addresses many Native voters have, or failure to accept a P.O. Box and an applicant’s drawing on the voter registration form, can result in them being purged from the voter rolls. Under the NVRA, election officials cannot deny a voter’s registration or purge an existing application because the applicant uses a non-traditional address or must be identified by landmarks or geographic features.

Additionally, failure to provide language assistance and information about voter purges in the covered Native language, as provided for under Section 203 of the VRA, can negatively impact Native language speaking voters. Wrongful purges can impact

Native voters for many subsequent elections. According to NARF's report:

"Once purged, many Native voters will not vote again in non-Tribal elections. Effectively, a voter purge can result in permanent disenfranchisement. Far too often, that is precisely what election officials intend to accomplish in Indian Country."

The various processes by which voters are removed from the rolls can be and is abused, resulting in numerous cases in which otherwise eligible voters were erroneously removed from the voting rolls. The data gathered by the Subcommittee illustrates the disproportionate and discriminatory impact borne by minority voters.

This record also demonstrates minority voters face a significant risk of being disproportionately burdened through voter roll purges which are attributable to discriminatory intent. The facts and circumstances surrounding several state and local voter list maintenance efforts and voter purges demonstrate that there is a high risk that the demonstrated, disproportionate burdens on minority voters of such efforts are a product of discriminatory intent.

First, the "historical background" of many of these widespread voter purge efforts raises concerns about intentional discrimination. Several analyses have found that jurisdictions previously covered by Section 5 of the VRA—states that had a history of engaging in intentional discrimination against minority voters—removed voters from their rolls at a faster rate than jurisdictions that had not been previously covered by Section 5. As noted in the discussion above, the Brennan Center found that jurisdictions previously covered by Section 5 would have removed two million fewer voters during the 2012 to 2016 period had they removed registrants at the same rate as jurisdictions not previously subject to preclearance; they removed voters at a significantly higher rate than previously non-covered jurisdictions.

Similarly, a 2020 nationwide study by two researchers at Columbia University's Barnard College found post-Shelby County increases in purge rates of between 1.5 and 4.5 points in jurisdictions formerly covered by Section 5 compared to jurisdictions that had never been covered. In several of these previously covered states, the rate at which voters cast provisional ballots increased after the voter purges, suggesting that voters were improperly purged.

The Subcommittee further found that several state efforts to remove alleged "non-citizens" from their voting rolls involved statements made by elected officials revealing of discriminatory intent. When Texas errantly used DMV records to identify "non-citizen" registrants, the Attorney General of Texas sent the following tweet:

"VOTER FRAUD ALERT: The @Txsecofstate discovered approximately 95,000 individuals identified by DPS as non-U.S. citizens have a matching voting registration record in TX, appr 58,000 of whom have voted in TX elections. Any illegal vote deprives Americans of their voice."

The Texas Governor then issued a statement supporting "prosecution where appropriate" of "this illegal vote [sic] registration." As noted above, these inflammatory allegations proved to be entirely false. Kristen Clarke, then-Executive Director of the Lawyers' Committee, testified before the Subcommittee in 2019 that, "the list was based on DMV data that the state knew was flawed and would necessarily sweep in thousands of citizens who completed the naturalization process after lawfully applying for a Texas drivers' license." Ms. Diaz testified that litigation work "led Texas officials to admit to knowing the discriminatory impact of their citizenship review on naturalized

citizens." A federal court described the state officials' communications regarding the non-citizen purge effort as "threatening" and "exemplify[ing] the power of government to strike fear and anxiety and to intimidate the least powerful among us."

Florida's misconceived use of the SAVE database to identify "non-citizen" registrants involved similarly troubling evidence of discriminatory intent. The U.S. Department of Homeland Security expressly advised Florida officials that the SAVE database was not a reliable tool to verify citizenship. The State was similarly warned in a letter from the Justice Department. Despite these warnings, Florida nevertheless moved forward with its effort to remove alleged non-citizens using SAVE data—an effort that, as explained above, disproportionately targeted minority voters. The State was ultimately ordered to discontinue its purge based on the use of SAVE data following litigation.

Additionally, many of these voter purges—such as the errant and unlawful purges in Florida, Georgia, and Texas—occurred in states that were previously covered jurisdictions under the VRA and had longstanding histories of racially polarized voting, which courts recognize provides Republican-controlled state legislatures with an incentive to engage in election administration practices that disproportionately burden minority voters likely to support non-Republican candidates. For example, between 2016 and 2018, Georgia purged more than 10 percent of its voters.

In the context of mass voter challenges, a 2016 case in North Carolina is illustrative of the way in which voter purges based off challenges can be used to discriminate against and suppress minority voters. As detailed in Ms. Lakin's testimony, in the months and weeks before the November 2016 elections, boards of election in three North Carolina counties canceled thousands of voter registrations, "based solely on challengers' evidence that mail sent to those addresses had been returned as undeliverable." Voters were not provided notice, and in one of the counties, "voters who were purged were disproportionately African American."

In a court hearing on the case, the federal district judge stated that she was "horried" by the "insane" process by which voters could be removed from the rolls without their knowledge, and went on to say that the mass challenges at issue, "sound[ed] like something that was put together in 1901." As noted previously, the federal court recognized that these challenges are essentially systematic voter purges and thus require the same protections, and ultimately barred the state from removing voters based on these challenges unless the voters is given notice and a waiting period and unless the removals comply with the NVRA's mandate of 90 days before federal elections.

As also noted above, the voter purge efforts in Florida and Texas were intended to combat registration and voting by non-citizens, yet each state's alleged evidence of non-citizen registration and voting proved wholly unsupported when subjected to even minimal scrutiny. The Texas actions, which largely targeted Latino voters, followed an election year wherein Latino voters doubled their turnout.

Since the 2020 election, several states have enacted new laws, along partisan lines, designed to purge voters more aggressively from their rolls. These new laws are justified by no more than unsupported claims of fraud or irregularities in the 2020 election. Iowa enacted a new "use-it-or-lose-it" voting list maintenance law requiring that the Iowa Secretary of State move all registrants who did not vote in the most recent general elec-

tion to "inactive" status—the first step toward removing the registrant from the state's rolls. Among those moved to "inactive" status were hundreds of 17-year-olds who were eligible to register but not yet eligible to vote in the 2020 general election.

Arizona and Florida enacted laws making it easier to remove voters from the states' vote-by-mail registration lists. And Georgia's new voting law, which imposes a variety of restrictions on voting, authorizes any individual Georgia citizen to file an unlimited number of challenges to the eligibility of particular voters.

CONCLUSION

The evidence before the Subcommittee leads to a clear conclusion—voter list maintenance and voter purge processes can be, and are, wielded in a discriminatory manner and have a disproportionate impact on minority voters. Additionally, as will be discussed later in this report, erroneously removing voters from the rolls does not affect only the individual voter, but can have rippling consequences at the polling place, increasing wait times that also disproportionately impact minority voters.

As Ms. Lakin of the ACLU stated in her testimony, "the integrity of our voter rolls—and thus our democratic process itself—are threatened by overly aggressive practices that wrongfully purge legitimate voters from the rolls—often disproportionately voters of color, voters with disabilities, and other historically disenfranchised voters." Also, tellingly, because the claimed justifications for the purge efforts have often been found to be unsupported or pretextual, the evidence illustrates that this disproportionate impact can be the product of discriminatory intent. As such, the methods by which states maintain their voter rolls and remove voters from active voter lists deserves a heightened level of scrutiny and protection for voters.

CHAPTER FOUR—VOTER IDENTIFICATION AND DOCUMENTARY PROOF-OF-CITIZENSHIP REQUIREMENTS

BACKGROUND

A variety of state laws require voters to provide identification or attempt to require documentary proof-of-citizenship to vote or register to vote. In recent years, voter identification ("voter ID") has been pushed forward by many as a simple requirement necessary to combat alleged voter fraud. This, again, is a false narrative.

As Catherine Lhamon, then-Chair of the U.S. Commission on Civil Rights, testified before the Subcommittee in 2019, "[N]ot only was there no evidence given to the Commission about widespread voter fraud, the data and the research that is bipartisan reflect that voter fraud is vanishingly rare in this country . . . [A]nd so, it is duplicative and also harmful to initiate strict voter ID, among other kinds of requirements, in the name of combating voter fraud."

Michael Waldman of the Brennan Center testified that, "[v]oter fraud in the United States is vanishingly rare. You are more likely to be struck by lightning than to commit in-person voter impersonation, for example." Furthermore, AAJC, MALDEF, and NALGO, note in their November 2019 report that, "[n]o proponent of strict ID requirements has ever produced credible evidence of widespread impersonation fraud in the registration or voting process that identification cards would allegedly prevent."

Despite a continuous lack of credible evidence that in-person voter fraud—the only form of fraud voter IDs would prevent—exists, these laws and policies continue to be pushed for and implemented across the country. Voter ID and documentary proof-of-citizenship laws can and do disproportionately

impact minority voters and create discriminatory barriers to the ballot box.

Across both this Congress and the last, the Subcommittee heard substantial testimony about the financial burden of voter IDs—effectively creating a new poll tax—and the disproportionate impact this has on minority and low-income voters. Even when states purport to offer “free” IDs, they are not free. This was also borne out in the U.S. Commission on Civil Rights’ 2018 statutory report, *An Assessment of Minority Voting Rights Access in the United States*. For instance, the USSCR report observed that “expenses for documentation (e.g., birth certificate), travel, and wait times are significant—especially for low-income voters (who are often voters of color)—and they typically range anywhere from \$75 to \$175.” According to Professor Richard Sobel’s report on the high cost of “free” photo voter ID cards:

“When legal fees are added to these numbers, the costs range as high as \$1,500. Even when adjusted for inflation, these figures represent substantially greater costs than the \$1.50 poll tax outlawed by the 24th Amendment in 1964.”

In evaluating these costs, Professor Sobel’s report identified seven types of costs for individual voters in obtaining a “free” voter ID: (1) direct costs (out of pocket expenses); (2) time costs for correspondence and waiting to receive documents; (3) postage, delivery, and special handling expenses for documents; (4) travel costs to and from various agencies in order to obtain documents and apply for the ID; (5) travel time costs for making trips to government offices; (6) navigating costs for having to maneuver complex bureaucracies; and (7) waiting time costs at government offices. Professor Sobel notes that there are other possible expenses for some individuals—such as those without driver’s licenses and without access to public transportation, and some may have to pay legal fees and court costs to obtain required documents.

Voter ID laws were some of the first voting laws implemented in previously covered states following the Supreme Court’s decision in *Shelby*. As Mr. Waldman stated in his testimony, “[i]n 2013, at least six states—Alabama, Mississippi, North Carolina, North Dakota, Virginia, and Texas—implemented or began to enforce strict photo ID laws, most of which had previously been blocked by the Department of Justice due to their discriminatory impact.”

Hours after *Shelby* County was decided, Texas revived a previously blocked voter ID law—one of the strictest in the country at the time. Passed and signed into law in 2011, the law did not go into immediate effect as Texas was subject to preclearance. In 2012, the law was denied preclearance on the grounds that it discriminated against Black and Latino voters. Yet, despite the denial of preclearance because of discriminatory effects, within two hours of the *Shelby* decision Texas’ Attorney General announced the law would immediately go into effect.

Also, within days of *Shelby*, Alabama announced it would move to enforce a photo ID law it had previously refused to submit to the Department of Justice for preclearance. In 2011, before the *Shelby* decision, the Alabama state legislature passed House Bill (HB) 19, a law requiring voters to present a form of government-issued photo ID to vote. HB 19 also included a provision that would allow a potential voter without the required ID to vote if that person could be “positively identified” by two poll workers, a provision Ms. Nelson of the NAACP Legal Defense Fund characterized as one that, “harkened back to pre-1965 vouch-to-vote systems.” Despite the bill being passed and sent to the Governor’s desk in 2011, it was not imple-

mented until after the *Shelby* decision was handed down—after the state was no longer required to submit its voting changes to the DOJ for preclearance review under the VRA.

Less than two months after the Supreme Court struck down the preclearance provisions, North Carolina state legislators wasted no time passing an omnibus “monster law.” The bill included voter ID provisions (among others) and would later be struck down as racially discriminatory. Records in the case showed that the data the State Legislature consulted, “showed that African Americans disproportionately lacked the most common kind of photo ID” and that after *Shelby*, “with race data in hand, the legislature amended the bill to exclude many of the alternative photo IDs used by African Americans. As amended, the bill retained only the kinds of IDs that white North Carolinians were more likely to possess.”

State laws governing the provision of identification at the time of voting can take several forms. Certain states require that a voter present a photo ID to vote (often referred to as “strict photo ID laws”). Other states require that a voter present an ID to vote, but do not require that the ID include a photograph (often referred to as “strict non-photo ID laws”). Others do not require that voters present an ID to vote, but nevertheless permit poll workers to request that voters present either a photo ID (so-called “Non-Strict Photo ID Laws”) or a non-photo ID (so-called “Non-Strict ID Laws”). Presently, 35 states have laws that request or require voters show some form of ID at the polls.

Furthermore, proof-of-citizenship laws require registrants to provide documentary proof that they are United States citizens to register to vote. States that have required documentary proof-of-citizenship as a condition to register to vote have required a variety of forms of citizenship documents such as birth certificates, passports, certificates of naturalization, or driver’s licenses that specifically identify the individual as a citizen.

Because they involve conditions for applying to register to vote, proof-of-citizenship laws implicate the NVRA. The NVRA provides that driver’s license applications and renewal applications “shall serve as an application for voter registration with respect to elections for Federal office.” Under the NVRA, the federal voter registration form and state voter registration forms included with a driver’s license application and renewal form must require that the applicant attest that they are eligible to vote (including on the basis of citizenship).

States such as Alabama, Arizona, Kansas, and Georgia attempted to enact laws requiring documentary proof of citizenship when registering to vote. Additionally, former Election Assistance Commission (“EAC”) Executive Director Brian Newby attempted to unilaterally allow Alabama, Georgia, and Kansas to require stringent proof-of-citizenship instructions when registering using the federal voter registration form—a move that was blocked by a federal court.

Evidence presented before the Subcommittee and discussed below shows that voter ID and documentary proof-of-citizenship requirements can and do have disproportionate, discriminatory, and suppressive impact on minority voters.

THE DISPROPORTIONATE AND DISCRIMINATORY BURDEN AND IMPACT ON MINORITY VOTERS OF VOTER ID AND DOCUMENTARY PROOF-OF-CITIZENSHIP LAWS

Voter ID Laws

Scholars and stakeholders have highlighted a number of ways in which voter ID and documentary proof-of-citizenship laws

can and do discriminate against minority voters. As Ms. Diaz of the UCLA Latino Policy and Politics Initiative testified:

“Racial/ethnic minorities are among those most sensitive to changes in voting. As such, reforms that enact voter identification laws to participate in an election have a disparate impact on minority voters voting. . . . Recent studies show that these effects are even more disastrous for youth of color, who have even less access to valid forms of identification.”

Additionally, a February 2020 report published by the UCLA School of Law Williams Institute estimates that voters who are transgender, particularly transgender voters of color, may face additional barriers when required to show ID to vote, especially if they have no ID documents that reflect their correct name and/or gender.

Obtaining the required form of identification or supporting documents is costly, which can disproportionately deter minority voters who are, on average, less wealthy than White voters and who disproportionately lack access to qualifying IDs or documentation. A 2013 study by Harvard Law School’s Charles Hamilton Houston Institute for Race & Justice found that, even in states that provide “free” ID cards, the actual cost of obtaining a qualifying photo ID ranged from \$75 to \$368 due to indirect costs associated with travel time, waiting time, and obtaining necessary supporting documentation.

The documents required to establish proof-of-citizenship are particularly expensive to obtain for naturalized and derivative citizens, sometimes costing in excess of \$1,000. Naturalized voters often must bear these costs in states that require voter ID as well because documents necessary to establish citizenship also are often necessary to obtain a qualifying form of identification. For example, Terry Ao Minnis, Senior Director of Census and Voting Programs for Asian Americans Advancing Justice AAJC, testified before the Subcommittee that:

“If naturalized and derivative citizens need a replacement certificate of citizenship or naturalization to register to vote, they face a major hurdle: certificates of citizenship presently cost upwards of \$1,170 and replacement certificates of naturalization cost upwards of \$555. In addition, to obtain a replacement, the average wait is between 8.5 to 11 months for the Department of Homeland Security to process and to obtain a certificate of citizenship the average wait is 6.5 to 14.5 months.”

These burdens will disproportionately burden a growing percentage of the U.S. population. Ms. Minnis testified that Census data show that 62.8 percent of eligible Asian American; 31.0 percent of eligible Latino voters; 23.9 percent Native Hawaiian and Pacific Islander voters; and 10.3 percent of eligible Black voters were naturalized citizens as of 2019, compared to just 3.8 percent of non-Hispanic white voters.

The substantial cost of obtaining qualifying IDs or supporting documentation is particularly high when, as is the case in certain states, DMVs, or other government offices where a voter can obtain a qualifying ID or other form of documentation, are less accessible for minority voters. Voter ID and proof-of-citizenship laws have become, in effect, modern-day poll taxes for many voters.

For example, the implementation of Alabama’s voter ID law soon after the *Shelby* decision, “was accompanied by the closure of nearly half of the state’s DMV locations, with most of the closures in disproportionately poor and Black counties.” The day after the *Shelby* decision, Alabama announced it would implement its 2011 photo ID law—a law it had delayed implementing for two years—for the 2014 election. As a result of the DMV closures, Black voters had

to spend more time and money to travel to obtain qualifying IDs. As noted in the Subcommittee's previous report, the U.S. Department of Transportation ("DOT") launched an investigation into the DMV closures, which eventually resulted in DOT and the State of Alabama entering into a settlement agreement.

Similarly, DMV offices are not present on reservation lands, meaning that Native American voters often must drive at least an hour to obtain an ID. Indeed, Native American voters in North Dakota had to travel, on average, twice as far as non-Native American voters to visit a driver's license office, with the average Standing Rock Sioux member having to travel over an hour and a half to reach the nearest site to obtain identification. As Matthew Campbell, Staff Attorney with NARF, testified:

"Today, many Native American reservations are located in extremely rural areas, distant from the nearest off-reservation border town. This was by design—official government policies forcibly removed Native Americans and segregated them onto the most remote and undesirable land. As a result of these policies, travel to county seats for voting services can be an astounding hundreds of miles away. Services such as DMVs and post offices can also require hours of travel."

Various studies have also demonstrated a variety of ways in which voter ID laws disproportionately burden minority voters. To begin, studies have consistently demonstrated that minority voters are disproportionately likely to lack forms of identification required by voter ID laws, meaning that minority voters are more likely to have to take the time and bear the costs of obtaining a qualifying ID.

For example, one analysis found that in four states that had adopted voter ID laws—Wisconsin, Indiana, Pennsylvania, and Texas—White voters were statistically more likely to possess a valid form of ID than Latino and Black voters. Numerous other state-specific and nationwide studies have reached the same conclusion—minority voters disproportionately lack qualifying IDs.

A meta-analysis using both state-level and national survey data revealed "that the magnitude of the negative impact of race on the likelihood of having a valid ID is substantial, outstripping other relevant variables like age, gender, and having been born outside the United States." This differential effect persisted even when the authors controlled for other explanatory factors like education level, home ownership, and income.

The Subcommittee also received evidence and testimony that the discriminatory burdens associated with obtaining voter ID and documentary proof-of-citizenship laws are particularly pronounced for Native American voters. For example, a North Dakota voter ID law required that qualifying IDs include the voter's physical address. However, Native American voters who live on reservations often lack a physical address, instead using a post office box. Mr. Campbell testified that "obtaining a state issued ID is unreasonably difficult for many Native voters."

The cost of obtaining a qualifying ID is also disproportionately burdensome for Native Americans, many of whom live below the poverty line and far from offices where they can obtain a qualifying ID. Mr. Campbell, who himself served as one of the litigators on the North Dakota voter ID case, testified that due to these and other issues, "voter identification laws can lead to the disenfranchisement of American Indians and Alaska Natives." Mr. Campbell further testified that "[f]or impoverished Native Americans, the cost of identification is often pro-

hibitively expensive. Even nominal fees can present a barrier." Likewise, Alysia LaCounte, General Counsel for the Turtle Mountain Band of Chippewa Indians, testified before the Subcommittee during the 116th Congress that the unemployment rate on the Turtle Mountain Reservation hovers near 70 percent: "[u]nderstand that the fee of \$15 is not exorbitantly high, but \$15 is milk and bread for a week for a poor family." Drivers' licenses are also often not required for everyday life on the reservation.

Tribal IDs are also not automatically accepted for registration and voting purposes, despite the barriers for tribal members to get a state ID. Often, even when states do accept a tribal ID, the state may require the ID contain certain information to be sufficient that tribal IDs do not contain—updating tribal IDs to contain specialized information or security features can be expensive for impoverished tribes. Additionally, housing insecurity is pervasive among Native communities, as is a lack of regular postal service, leading many Native individuals to use P.O. Boxes instead of a residential address or omit an address altogether. All of these factors lead to voter ID laws having a disproportionate impact on Native American voters.

The Subcommittee also received substantial testimony in the 116th Congress from leaders of the Standing Rock Sioux Tribe, the Turtle Mountain Band of Chippewa Indians, the Spirit Lake Tribe, and the Mandan Hidatsa and Arikara Nation about the significant and disproportionate burden North Dakota's voter ID law had upon their tribal governments and members. Tribal leaders testified as to the substantial resource burden their tribes took on in order to provide their members with new IDs that would qualify for voting under the new law—resources their tribes did not necessarily have. Additional testimony was gathered in the 116th Congress at a field hearing conducted in Phoenix, Arizona, and the February 11, 2020, hearing on Native American voting rights further detailing how voter ID issues disproportionately impact Native voters.

Other studies have demonstrated that local officials administer voter ID laws in a discriminatory manner. Dr. Lonna Rae Atkeson of the University of New Mexico testified that several studies of poll workers and voters suggest that implementation practices can result in unequal application of voter identification laws. A study of New Mexico's non-strict voter ID law, for example, found that poll officials were more likely to request that Hispanic voters show an ID than non-Hispanic voters. Dr. Atkeson further testified that the effects of voter ID laws may also be to affect voter confidence and satisfaction in the election process, which may have long-term consequences on voter turnout or lead to increases in provisional voting. Additionally, Dr. Atkeson testified that subsequent studies have sometimes shown various degrees of differences in implementation of voter ID laws between Whites and Hispanics in New Mexico.

Similar studies in Michigan and Boston reached the same result—poll workers are significantly more likely to request that minority voters present ID than White voters. Relatedly, a separate multi-state study found that (1) state and local election officials were less likely to answer email questions regarding voter ID requirements when the individual posing the question had a Latino last name and that (2) election officials provided less accurate information regarding voter ID requirements to requesters with Latino last names. This research demonstrates that even non-strict voter ID laws impose discriminatory burdens on minority voters.

Numerous studies also have demonstrated that strict voter ID laws disproportionately decrease registration and turnout of minority voters relative to White voters. One study focusing on Texas' strict voter ID law found that "registrants voting without ID in 2016 were 14 percentage points less likely to vote in the 2014 election, when a strict ID mandate was in place, and significantly more likely to be Black and Latinx than the population voting with ID in 2016." Additionally, a 2014 report prepared by the Government Accountability Office found that strict voter ID laws in Kansas and Tennessee reduced turnout by larger amounts among African American registrants than among White, Asian American, and Hispanic registrants.

Nationwide and multi-state studies conducted by Dr. Nazita Lajevardi of Michigan State University and her colleagues compared political participation of minority voters in states with strict voter ID laws and states without such laws. In one set of studies, Dr. Lajevardi and her colleagues found that strict voter ID laws "have a differentially negative impact on the turnout of racial and ethnic minorities in primaries and general elections," estimating that Latinos, for example, are 10 percent less likely to turnout in general elections in states with strict voter ID laws than in states without such laws.

Dr. Lajevardi and her colleagues further found that, in primary elections, strict voter ID laws "depress Latino turnout by 9.3 percentage points, Black turnout by 8.6 points, and Asian American turnout by 12.5 points." These turnout declines were associated with increases—in many cases several-fold increases—in the gap in participation rates between white and non-white voters. In another study published several years later, Dr. Lajevardi and her co-authors found a similar result using a different multi-state dataset and methodology. The study found that "turnout declined significantly more in racially diverse counties relative to less diverse counties in states that enacted strict identification laws . . . than it did in other states."

Summarizing these and other studies analyzing the impact of voter ID laws on the political participation of minority voters, Dr. Lajevardi testified that "strict voter identification laws are racially discriminatory and have real consequences for impacting the racial makeup of the voting population." Dr. Lajevardi also testified that, "[b]y raising the cost of voting for some individuals more than others, they affect who votes and who does not, and in doing so, they substantially shape whose voices are represented in our democracy."

Dr. Matthew Barreto of the UCLA Latino Policy and Politics Initiative agreed:

"The best evidence available suggests that voter ID laws have a negative, racially disparate impact on turnout across the states . . . [and] that racial disparities in access to identification appropriate for voting persist even after accounting for important covariates like education and income."

Documentary Proof-of-Citizenship Requirements

While all states require proof of citizenship to register to vote, an attestation of citizenship under penalty of perjury has generally met the requirement. Similar to voter ID laws, documentary proof-of-citizenship requirements have purported to combat non-citizen voting—a claim that is false.

Documentary proof-of-citizenship laws have also been shown to have similar discriminatory effects on political participation by minority voters as voter ID laws. For example, evidence developed in the course of an investigation by the Kansas State Advisory Committee to the USCCR found that a

disproportionate number of Kansas voters who had incomplete voting applications or were placed on the suspense voters list were located in Census tracts with a disproportionately high percentage of Black residents, younger voters, and low-income voters, for whom the high cost of obtaining proof-of-citizenship was disproportionately burdensome. After Arizona's adoption of a documentary proof-of-citizenship law, for example, "the percent share of Latino voter registration in the state fell."

Recent studies have demonstrated that African American and Latino voters are less likely to have access to birth certificates and passports—documents often required to establish proof of citizenship—than White voters. And Puerto Rican-born voters face particularly significant difficulty obtaining documents necessary to prove their citizenship as a result of a 2009 change in birth certificate standards that invalidated all birth certificates issued by Puerto Rico prior to 2010—a change that potentially impacts approximately 1.8 million Puerto Rican-born adults now living on the mainland. Since the new standards were adopted, Puerto Rican-born voters who seek to register to vote in a state with a proof-of-citizenship requirement must either have a U.S. passport, or go through additional procedures and pay fees for a new birth certificate after July 2010.

Kira Romero-Craft, Director, Southeast Region for LatinoJustice PRLDEF, testified that in July 2019, for example, LatinoJustice and the Southern Center for Human Rights filed suit in the U.S. District Court for the Northern District of Georgia on behalf of their client for discrimination based on the Georgia Department of Driver Services' ("DDS") practice of "confiscating original identity documents from Puerto Rican-born applicants for Georgia drivers' licenses and denying equal protection of the laws and privileges due to Puerto Rican-born U.S. citizens." LatinoJustice's investigations found that the practice of turning away U.S. citizens presenting Puerto Rican identity documents, confiscating Puerto Rico birth certifications and original Social Security cards for "fraud" investigations, or denying them the opportunity to exchange their driver licenses for a Georgia license had been going on as far back as the 1990s and undoubtedly harmed U.S. citizens who were otherwise eligible to vote.

As Ms. Diaz of the UCLA Latino Policy and Politics Initiative testified, proof-of-citizenship laws "give rise to a presumption that the growing and diverse Latino population is under attack; this was especially true of Arizona, where a proof of citizenship law was overturned by the Ninth Circuit." Andrea Senteno, Regional Counsel for MALDEF, testified that there is a growing body of evidence that:

"[S]hows that proof of citizenship requirements in fact prevent significant numbers of U.S. citizens from registering to vote, and that "[s]urveys show that millions of American citizens—between five and seven percent—don't have the most common types of documents used to prove citizenship: a passport or birth certificate."

Additionally, Terry Ao Minnis of AAJC testified that documentary proof-of-citizenship, as well as voter ID requirements, disproportionately impact Asian Americans due to high rates of immigration and naturalization in the community. Ms. Minnis testified that Asian Americans will "face greater barriers to registration than white voters under these laws as 76.6 percent of Asian American adults are foreign-born and 39.5 percent of Asian American adults have naturalized nationwide, compared to 4.6 percent of white adults who are foreign-born and 3.8 percent who have naturalized."

ADDITIONAL EVIDENCE OF DISCRIMINATORY PURPOSE

The Subcommittee was also confronted with evidence that the discriminatory impact of voter ID and documentary proof-of-citizenship laws are the product of state legislatures enacting them with a discriminatory purpose. As noted above, following the Supreme Court's decision in *Shelby County*, several states enacted or implemented particularly strict voter ID laws, several of which were later struck down by courts as intentionally discriminatory, and violative of the Constitution and the Voting Rights Act. These restrictions are examples of discrimination in voting that warrant preemptive federal protections.

For example, as first discussed above, within days of the *Shelby County* decision, Texas implemented a photo ID law that had previously been denied preclearance by the Department of Justice. As Janai Nelson of the NAACP Legal Defense Fund testified, the law was widely described as the most restrictive voter ID law in the country as it permitted concealed handgun license owners to vote with that ID—a form disproportionately held by white Texans—but prohibited the use of student IDs, and employee or trial state or federal government-issued IDs in voting.

The Texas voter ID case took years to make its way through the courts. A federal court found that the voter ID law was unconstitutional intended to discriminate against minority voters, relying on evidence that the law selectively excluded forms of IDs that were disproportionately likely to be used by minority voters, that the legislature knew the law was likely to disproportionately burden minority voters, and that circumstantial evidence indicated that the legislature's race-neutral justification for the law—preventing voter fraud—was "pretextual." Ms. Nelson testified further that, while LDF was ultimately successful in the Texas voter ID litigation, "in the years after the trial and while the case made its way twice to the 5th Circuit Court of Appeals and back to the trial court, Texas elected numerous candidates to state and federal office . . ."

A federal appellate court also struck down North Carolina's voter ID law as intentionally discriminatory, a law which was also was put forth within days of the *Shelby County* decision. Evidence in the North Carolina voter ID case revealed that legislators tailored the list of acceptable IDs to exclude forms of identification disproportionately relied on by minority voters. To support its finding of discriminatory intent—that the state legislature drafted the law to "target African Americans with almost surgical precision"—the court emphasized that North Carolina had a long history of racially polarized voting, that the law required forms of IDs that African Americans disproportionately lacked, that legislators knew the law would disproportionately burden minority voters but nevertheless enacted it, and that the circumstances surrounding the passage of the law—that the law was amended to become far more strict the day after *Shelby County* was decided—indicated that the legislature acted with discriminatory intent.

While the court ultimately struck down the North Carolina law, litigation alone is a costly, time consuming, and insufficient remedy. As Allison Riggs, Co-Executive Director and Chief Counsel for Voting Rights at the Southern Coalition for Social Justice ("SCSJ"), testified:

"[I]t took us three years and millions of dollars to finally secure a ruling from the Fourth Circuit Court of Appeals that the law was intentionally racially discriminatory, designed with almost "surgical precision" to

change election rules in a way that would disadvantage Black voters the most. More than the time and cost, there were elections conducted with the photo ID requirement . . . Thousands of voters, disproportionately Black, were denied the franchise while we litigated that case, and those are real injuries to those voters' fundamental right to vote that can never be made whole."

As the Texas and North Carolina cases illustrate, the risk that voter ID and documentary proof-of-citizenship laws can and will be enacted with discriminatory intent is particularly significant because legislatures can tailor the forms of acceptable IDs and documentation to disproportionately burden minority voters.

For example, Dr. Barreto, who has conducted extensive research into the discriminatory effects of voter ID laws, explained in his testimony that "[i]n Texas, hunting and gun permits, which Whites are statistically more likely to possess, are legitimate forms of ID but social service cards, more often held by Blacks and Latinos, are not." Consistent with that empirical evidence, a Texas legislator testified "that all of the legislators knew that [the voter ID law], through its intentional choices of which IDs to allow, was going to affect minorities most."

Regarding discriminatory intent, Dr. Barreto further explained that research shows that voter ID laws have been adopted by partisan legislatures, often in states with a history of racially polarized voting, to burden voters likely to vote against the party with legislative control. "Existing research demonstrates that voter ID laws are purposeful tools, designed with the marginalized fringe of the electorate in mind, to shape who votes primarily in favor of state Republican legislatures facing competitive elections," Dr. Barreto explained.

Consistent with Dr. Barreto's summary of the literature, Matthew Campbell testified that North Dakota's Republican legislature—which had previously rejected voter ID laws—enacted the state's strict voter ID law after Native American voters were instrumental to the election of a Democratic candidate to the United States Senate.

Using an atypical procedural process known as a "hodgehouse amendment" that "expedited the bill's passage and stifled debate," the legislature enacted the law knowing that Native Americans, who often have P.O. Boxes rather than the physical address required by the statute, would have a disproportionately difficult time obtaining a qualifying ID. A federal court subsequently struck down the law on grounds that it imposed an unconstitutional burden on Native American voters, relying on evidence that Native American voters were disproportionately likely to lack a qualifying ID and ruling that North Dakota could not enforce the laws without providing a safety net for voters who "cannot obtain a qualifying ID with reasonable effort."

Despite a lack of fraud and knowledge of the significant impact on Native American voters, North Dakota adopted a strict voter ID law again in 2017. Mr. Campbell testified that, in considering the new voter ID law, "the legislature failed to study, in any way, the impact the law would have on Native Americans. It did not consult any tribal governments about whether its tribal members were negatively impacted by the bill or whether they supported or opposed the bill."

Following enactment, additional litigation ensued, and the parties eventually settled the matter in a way that ensured Native voters would have equal access to the ballot, but not before the District Court found that the new law required voters have one of the same forms of a qualifying ID that, "was previously found to impose a discriminatory

and burdensome impact on Native Americans.”

Similarly, in finding that the Texas voter ID law was intentionally discriminatory, the court emphasized that the voter ID law was passed “in the wake of a seismic demographic shift, as minority populations rapidly increased in Texas, such that . . . the party currently in power [wa]s facing a declining voter base and [could] gain partisan advantage through a strict voter ID law.”

The Texas and North Carolina examples illustrate another reason why there is a substantial risk that the discriminatory effects of voter ID and proof-of-citizenship laws are attributable to a discriminatory purpose: States’ proffered justification for the laws have been shown to be pretextual or unsupported.

For instance, in the Texas voter ID case, the court found evidence “support[ing] a finding that the Legislature’s race-neutral reason of ballot integrity offered by the State is pretextual.” Among other evidence, the record showed that “the evidence before the Legislature was that in-person voting, the only concern addressed by [the voter ID law], yielded only two convictions for in-person voter impersonation fraud out of 20 million votes cases in the decade leading up to [the law’s] passage.”

A case successfully challenging a Kansas documentary proof-of-citizenship statute similarly turned on evidence that the alleged justification for the law—preventing voter fraud—lacked meaningful factual support. In finding that the law violated the Equal Protection Clause, the U.S. Court of Appeals for the Tenth Circuit held that law’s significant burden on the right to vote (it prevented more than 31,000 qualified applicants from obtaining registration) far outweighed the evidence supporting the state’s claimed need to prevent voter fraud by non-citizens (the state identified only 30 non-citizens who registered to vote in the 10 years leading up to adoption of the documentary proof-of-citizenship law).

The record in a case successfully challenging an Arizona proof-of-citizenship law similarly included a conspicuous absence of evidence supporting the legislature’s claimed purpose of combatting voter fraud by non-citizens. Ms. Senteno of MALDEF testified that, Arizona’s Proposition 200 was enacted with the purpose of combatting undocumented immigration and the provisions related to proof of citizenship were in part an effort to “combat voter fraud”—but the State “failed to identify a single instance in which an undocumented immigrant registered or voted in Arizona.” Ms. Senteno testified that:

“Proof-of-citizenship requirements have yet to prove effective in making our elections more secure or to be more effective than the safeguards against improper registration and voting that already exist. Meanwhile, such requirements have shown to significantly impede the political participation of voters of color.”

Additionally, since the 2020 election, several states have adopted bills expanding voter ID requirements, appealing to unsupported claims that fraud occurred in the 2020 election as justification. For example, the omnibus Georgia voting bill requires voters requesting an absentee ballot provide an ID. Under previous law, voters only had to sign the application attesting to their eligibility to vote. Similarly, Florida’s omnibus voting law added a new requirement that voters provide a form of ID to obtain a mail-in ballot. Arkansas, Montana, and Wyoming also made their voter ID laws more restrictive.

CONCLUSION

The evidence before the Subcommittee is overwhelming—voter ID laws and require-

ments for documentary proof-of-citizenship can and do have a disproportionate, discriminatory impact on minority voters. The evidence presented shows that minority voters are less likely than White voters to have the required ID and are more likely to lack the documents required to obtain these IDs. Voter ID and documentary proof-of-citizenship requirements amount to modern-day poll taxes—as the evidence shows, even when states claim to provide free IDs, the cost to voters is not free.

The burden of voter ID and proof-of-citizenship laws is borne disproportionately by Black, Latino, Asian American, and Native American voters, and as the evidence shows, states can and have enacted laws governing ID requirements to cast a ballot that not only have a discriminatory impact but do so with discriminatory intent. The discriminatory and suppressive effects of voter ID and proof-of-citizenship requirements warrant a heightened level of scrutiny and protection to ensure every voter has equal and equitable access to their right to vote.

CHAPTER FIVE—ACCESS TO MULTI-LINGUAL VOTING MATERIALS AND ASSISTANCE BACKGROUND

As it was amended over the years, the VRA was expanded to afford additional protections to language minority or limited-English proficiency (“LEP”) voters. The language access provisions were added after Congress recognized that certain minority citizens experienced historical discrimination and disenfranchisement due to limited English proficiency and speaking ability. The 1975 amendments adding Section 203 of the VRA came after “Congressional findings of discrimination and intimidation of voters with limited-English proficiency, which had led to ongoing socioeconomic disparities and low literacy rates.”

Sections 4(e), 4(f), 203, and 208 are considered the “language minority provisions” of the VRA. These sections were not overturned by the Shelby decision, and remain key protections for LEP voters. However, significant gaps in enforcement and implementation remain, and the Court’s decision in Shelby and subsequent removal of preclearance hindered a key enforcement and monitoring mechanism, limiting access for millions of LEP voters—a disproportionate number of whom are minority voters.

Section 4(e) protects U.S. citizens educated “in American flag schools” in a language other than English by barring states and local governments from conditioning such citizens’ right to vote on their ability to read, write, understand, or interpret English. In practice, this means that every state and local government is required to provide language assistance to such voters and it provides specific protections to citizens educated in Puerto Rico in Spanish.

These protections extend to all 50 states, whether the voter lives in a jurisdiction covered by the population thresholds of Section 203’s coverage formula or not.

Section 203 of the VRA, originally adopted as part of the second reauthorization in 1975 and later amended and expanded, requires jurisdictions where the number of U.S. citizens of voting age in a single, covered language minority group that is more than 10,000 or exceeds five percent of the jurisdiction’s total population, and their illiteracy rate is higher than the national rate, to provide voting materials in the language of the language minority. The definition of permanently prohibited “test[s] and device[s]” was expanded to include:

“[A]ny practice or requirement by which any State or political subdivision provided any registration or voting notices, forms, instructions, assistance, or other materials or

information relating to the electoral process, including ballots, only in the English language, where the Director of the Census determines that more than five per centum of the citizens of voting age residing in such State or political subdivision are members of a single language minority.”

The 1992 VRA amendments expanded the coverage formula for language access to include not only the previously covered formula of five percent of eligible voters who were LEP voters and members of a language minority group, but also those jurisdictions that did not have the high five percent threshold, but had at least 10,000 LEP citizens who are members of a single language minority group. This expansion meant coverage would also reach Latino and Asian American voters in some large cities. These amendments also expanded the coverage formulas and access for Native Americans living on Indian Reservations to include any Indian reservation where the LEP population exceeded five percent of all reservation residents. Under the VRA 2006 reauthorization, the sunset date for language minority assistance required under Section 203 was extended to August 5, 2032.

Which jurisdictions are covered under Section 203 is determined by the Census Bureau based on the formula set out in the VRA—the language minority groups covered are those that speak Asian, American Indian, Alaska Native, and Spanish languages. The most recent determinations for Section 203 coverage were made on December 5, 2016. In the 2016 evaluation, the Census Bureau found that 263 jurisdictions met the threshold for coverage.

Between 2011 and 2016, 15 additional counties were added to the list of localities required to provide language assistance materials as well as four new states. Political subdivisions within Alaska, Arizona, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Maryland, Massachusetts, Michigan, Mississippi, Nebraska, Nevada, New Jersey, New Mexico, New York, Oklahoma, Pennsylvania, Rhode Island, Texas, Utah, Virginia, Washington, and Wisconsin currently fall under Section 203 coverage and are required to provide bilingual voting materials. California, Florida, and Texas currently fall under statewide coverage for Spanish language materials.

Added in the 1982 VRA reauthorization, Section 208 requires that voters who require assistance to vote be provided the assistance of their choice. Voters have the right to assistance by a person of their choosing—other than their employer, an agent of their employer, or an officer or agent of the voter’s union—whether they need assistance because of blindness, disability, or inability to read or write. According to the USCCR’s 2018 Minority Voting Rights Access Report, Section 208 litigation by the Justice Department typically relates to the failure to provide language assistance or a failure to allow a disabled person to choose their assistance.

Prior to the Shelby County decision, covered jurisdictions were required to obtain preclearance of any changes in laws related to the provision of language access under Sections 4(f)(4) and Section 5. Following the Shelby decision, the Justice Department stated that it believed it could no longer require preclearance of changes in access to language materials and support in the previously covered jurisdictions.

When properly implemented, the language access provisions increase engagement in the democratic process and access to the ballot for millions of LEP voters. For example, John Yang, President and Executive Director of AAJC, testified before the Subcommittee in 2019 that “Section 203 has been

one of the most critical provisions in ensuring Asian Americans are able to cast their ballot.” Jerry Vattamala, Director of the Democracy Program at the Asian American Legal Defense and Education Fund (“AALDEF”) testified that:

“Section 203 has proven to be a clear and effective measure to ensure access to LEP voters through language assistance. . . . However, the Supreme Court’s Shelby County decision dismantling the coverage formula has left a large gap in protections for Asian American voters that requires Congressional action and renewed DOJ enforcement of remaining VRA provisions.”

Failure to provide multi-lingual voting materials or assistance can negatively impact millions of potential voters. According to the 2018 Census data, more than 37 million American adults speak a language other than English and more than 11.4 million of them are not yet fully fluent in English. The 2015–2019 American Community Survey (ACS) 5-year Narrative Profile from the Census Bureau found that, among people at least five years old living in the U.S. from 2015–2019, 21.6 percent spoke a language other than English at home. Additionally, navigating the electoral process is complex and can be overwhelming. Some LEP voters will have immigrated from a country with a vastly different electoral and voting process.

Evidence collected by the Subcommittee during the 116th and 117th Congresses, along with historical data, illustrates a long history of jurisdictions’ failure to comply with the language access provisions, a failure to provide adequate language assistance and translated materials, and the discriminatory impact this failure has on minority voters’ access to the ballot.

Arturo Vargas, Chief Executive Officer of the National Association of Latino Elected and Appointed Officials Educational Fund (“NALEO”) testified in 2019 that, “Americans who depend upon language assistance are becoming more diverse and more geographically dispersed, and these factors heighten the importance of effective language assistance.”

THE DISPROPORTIONATE AND DISCRIMINATORY BURDEN AND IMPACT OF LACK OF ACCESS TO MULTI-LINGUAL VOTING MATERIALS AND SUPPORT

The failure to provide multi-lingual voting materials disproportionately burdens minority voters. Sonja Diaz of UCLA’s Latino Policy and Politics Initiative testified that, as of 2019, approximately 4.82 percent of the citizen voting-age population needs to cast a ballot in a language other than English. Data trends show that populations such as Asian American and Latino voters will only continue to grow. While the full 2020 Census data has yet to be released, Ms. Minnis testified that, among Asian Americans “[t]his growth will continue, with Asian American and Pacific Islander (AAPI) voters making up five percent of the national electorate by 2025 and 10 percent of the national electorate by 2044.”

According to 2017 data, more than 85 percent of the voters who likely require language assistance in voting were voters of color. For example, Ms. Diaz stated that an estimated six million eligible Latino voters nationwide are not fully fluent in English and require some form of language assistance in order to vote. Additionally, Juan Cartagena, President and General Counsel of LatinoJustice PRLDEF, testified before the Subcommittee in 2019 that the population on the island of Puerto Rico is roughly 65 percent Spanish-language dominant. Furthermore, in Puerto Rico all government proceedings happen in Spanish, making the language access protections afforded Puerto

Ricans educated on the island under Section 4(e) critical to their ability to participate fully in elections within the 50 states.

According to data collected by the Native American Rights Fund, “[o]ver a quarter of all single-race American Indian and Alaska Natives speak a language other than English at home,” rendering multi-lingual voting materials particularly important for Native American voters.

Ms. Minnis of AAJC testified that, because of historical discrimination that denied Asian Americans the rights held by U.S. citizens for most of the country’s existence, and because immigration from Asia was not reopened until 1965, today “almost three out of every four Asian Americans speaks a language other than English at home and almost one in three Asian Americans is limited English proficient (LEP)—that is, has some difficulty with the English language.”

The provision of language access materials, or lack thereof, extends to all facets of the voting process. Ms. Minnis testified that, even basic information such as election notices and voter registration forms or the information requested on those forms “is inaccessible to millions of eligible American voters unless they have access to multilingual translators, preventing the eligible voter from even starting the process.” Ms. Minnis further testified that, even if the voter is able to get past the registration phase, without language assistance they may have issues navigating the voting process, with many voters forced to use election websites that are English-only, or a jurisdiction may attempt to use Google Translate or a similar tool, which may produce incomplete or inaccurate translations, the equivalent of providing no translation at all.

Matthew Campbell of NARF testified to the disproportionate impact the lack of language access and assistance has on Native voters as well. According to his testimony, “[t]wo-thirds of all speakers of American Indian or Alaska Native languages reside on a reservation or in a Native village, including many who are linguistically isolated, have limited English skills, or a high rate of illiteracy,” and that a lack of assistance or complete and accurate translations of materials for LEP American Indian and Alaska Native voters “can be a substantial barrier.” Thirty-five political subdivisions in nine states are required to provide bilingual written materials and oral language assistance for LEP American Indian and Alaska Native voters under Section 203. Mr. Campbell noted that, jurisdictions have often failed to provide any language assistance at all, forcing Native voters to file costly lawsuits.

Scholars and stakeholders have demonstrated that providing LEP voters with voting materials in their native language increases the likelihood they will participate in the political process. Studies have shown, for example, that language fluency correlates with political participation, meaning that lowering language barriers should lead to increases in turnout among LEP voters. Summarizing the scholarly literature examining the impact of access to multi-lingual voting materials on LEP voters, Dr. Barreto explained that “[r]esearch in political science has documented with clear evidence that access to Spanish, Asian, and Native/indigenous language voting materials increases voter participation rates among impacted minority voters.”

Scholars and stakeholders have also analyzed the registration and turnout effects associated with living in a jurisdiction that provides language access materials, finding that access to native language voting materials increases political participation. For example, after San Diego County, California, began providing language assistance to

Latinos and Filipinos, voter registration among those two groups increased by more than 20 percent. Regarding turnout, one multi-jurisdiction study found that turnout of voters who speak only Spanish increased between seven and 11 percentage points in counties that were required to provide language access support relative to counties with similarly large Latino populations not required to provide bilingual voting support.

Another multi-state study found that, in the 2012 election, coverage under the VRA’s language access provisions was associated with a significant increase in Latino voter registration and a significant increase in Asian American turnout. Earlier studies reached the same conclusion: “Section 203 language access resulted in higher voting rates for Latinos, Asian Americans and other immigrant communities.” Surveying several of these studies, Ms. Minnis of AAJC explained that “[i]f the access to multilingual support helps to eradicate language barriers, the withdrawal or denial of multilingual support exacerbates language barriers, interferes with free and fair access to the ballot through the voting process, and leads to less voters participating in American democracy.”

Empirical research also found evidence that coverage under the VRA increases minority political participation. One study found that coverage under the Voting Rights Act language access provisions is associated with significantly higher Latino representation on school boards relative to non-covered jurisdictions. That empirical finding is consistent with evidence presented to the Subcommittee. For example, Orange County, California, and Harris County, Texas, saw the election of Vietnamese American elected officials after they began providing language assistance to Vietnamese American voters.

Dr. Barreto testified that, “similar to voter identification laws, the research has demonstrated an inconsistent application with many covered jurisdictions not aware or not providing the proper non-English voting materials. This has a tremendously negative impact on those communities’ ability to understand and participate in our elections.”

Illustrative of the broad protections courts have read into language protections such as Section 4(e), Kira Romero-Craft, Southeast Region Director for LatinoJustice, testified that courts have declined to read any numerical requirements into Section 4(e)’s plain language and have ordered counties with as few as two dozen Puerto Rican voters to offer some bilingual assistance because, “it is a ‘basic truth that even one disenfranchised voter—let alone several thousand—is too many.’”

Limits on language assistance also disproportionately impacts minority voters. Ms. Senteno testified that, for example, MALDEF is involved in a pending case in Arkansas challenging a section of the state’s election code that limits the number of voters an individual may assist with casting a ballot to six total, arguably restricting the number of voters who may be able to receive language assistance from the person of their choice.

The manner in which voting materials and ballots are written can also negatively impact LEP voters. Ms. Minnis testified that, even if an LEP voter is able to obtain a ballot, it is often written in advanced English, which is not accessible for LEP voters. In her testimony, Ms. Minnis notes that an analysis of statewide ballot measures voters voted on in 2018 found that the average grade level was between 19 and 20, meaning it would require a graduate-level degree to understand them. The use of complex English on ballots and other voter materials makes it difficult for LEP voters to understand and

respond, which can also be compounded by higher levels of illiteracy rates, whether in English or the voter's native language.

Dr. Barreto testified that, where Section 203 and 208 have been implemented fairly and fully.

"[W]e have seen a higher voter participation rate, both first-time voters as well as [] of returning voters, where the most difficult things can be for a voter which has language challenges to navigate the system, and if they don't feel that they can do that, if they don't feel welcome, if the language materials are not available [] they may just leave and not come back. They may feel excluded from the system. Where Section 203 is implemented, there have been very robust increases in Spanish-speaking Latino voter participation."

Dr. Barreto noted that, where voters have a negative experience at the polls and are challenged or are not able to navigate the polling place, "that leads to a rejection and withdrawal."

Several legal actions have successfully sought to compel local election officials to provide language access materials, often requiring years of litigation for plaintiffs to obtain relief and involving troubling evidence of discriminatory animus.

A district court found that Berks County, Pennsylvania, for example, failed to adhere to language access provisions in the VRA by failing to offer Spanish-language materials for voters educated in Puerto Rico and failing to make available bilingual poll workers. The court further found that local election officials engaged in "hostile and unequal treatment" of Hispanic and LEP voters, which "intimidated" such voters.

Additionally, Ms. Romero-Craft testified that the State of Florida has been a covered jurisdiction for the Spanish language under Section 203 since 2011 and that there are also 13 counties in the state which are subject to minority language requirements for Spanish under the law. Yet, despite the direct protections of the law:

"Florida's language minority voters have continued to face discrimination at the polls and frequently do not receive adequate language assistance they critically need to be able to cast a ballot for their preferred candidate of choice or to make informed decisions when deciding how to cast their votes on ballot initiatives."

A district court recently entered an order barring dozens of Florida counties from continuing to violate the VRA by failing to provide bilingual voting assistance to voters of Puerto Rican descent. The plaintiffs were repeatedly forced to pursue further relief after a number of election officials refused to comply with the order and make multi-lingual assistance available, asserting, for example, that "the small number of voters requesting Spanish-language ballots did not justify the cost." Florida was previously sued in 2000 by the Department of Justice for failure to provide language materials and in 2009 by LatinoJustice for failure to provide assistance to voters from Puerto Rico as required. District Judge Mark Walker noted in his order that, "[i]t is remarkable that it takes a coalition of voting rights organizations and individuals to sue in federal court to seek minimal compliance with the plain language of a venerable 53-year-old law."

The Subcommittee also received widespread reports of non-compliance with the VRA's language access requirements, in numerous states and localities, and often involving troubling evidence or inference of discriminatory intent. Ms. Romero-Craft provided testimony of examples in Florida and Georgia, such as Liberty County, Georgia's failure to provide Spanish-language voting materials and services despite citi-

zens of Puerto Rican descent comprising nearly five percent of the county's total population. In testimony provided in the 116th Congress, Sean Young of the ACLU of Georgia testified that Hall County, Georgia was required to provide Spanish language materials under Section 4(e), as all counties are, but the board refused. One study found that only 68.5 percent of jurisdictions fully complied with the Voting Rights Act's language access requirements with respect to the provision of Spanish language materials.

Jerry Vattamala of AALDEF testified to several examples of jurisdictions' failure to provide language access materials to Asian American voters. For example, AALDEF filed a federal complaint on June 3, 2021, against the City of Hamtramck, Michigan, for its failure to comply with the requirements as a covered jurisdiction under Section 203 for Hamtramck to provide translations of all voting information and materials, including election websites, and oral language assistance for Bangladeshi voters in Bengali.

In another example, Mr. Vattamala highlighted jurisdictions' failure to ensure equal access to interpreters or through hostile treatment or discrimination by poll workers such as AALDEF discovered when monitoring the primary election in Malden, Massachusetts, in March 2020, a jurisdiction covered under Section 203 for Chinese language assistance. Ms. Minnis testified that, during the 2012 election, voters reported to the Election Protection Coalition that "they had been unlawfully prevented from obtaining language assistance at polling places from Suffolk County, New York, to New Orleans, Louisiana, and including an incident "in Kansas City, Missouri, where a poll worker asked a voter's interpreter to leave the polling place and threatened her with arrest." Marcia Johnson-Blanco of the Lawyers' Committee testified that, in the 2020 election, voters reported lack of or insufficient language assistance in Berks and York counties in Pennsylvania. Ms. Johnson-Blanco testified that:

"The most egregious instance occurred in York County, where election officials rather than provide needed language assistance (1) spoke slowly and used hand gestures and mimicry as a prerequisite to allowing voters to utilize an interpreter, (2) impeded interpreters' conversations with voters by hovering over conversations and interrupting interactions telling voters that they could not use the interpreter and (3) prevented voters from using their assistance of choice with casting their ballot."

Repeated failure to provide bilingual voting materials is also, troublingly, particularly common in Native American communities, and has led to litigation. Section 203 covers 357,409 American Indians and Alaska Natives who reside in a jurisdiction where assistance must be provided in a covered Native language. However, as Matthew Campbell of NARF testified, jurisdictions have often failed to provide the required translations or have failed to provide any language assistance at all, forcing costly lawsuits. Mr. Campbell testified that this is exactly what happened in Alaska, which led to *Toyukak v. Treadwell*, "the first Section 203 case fully tried through a decision in thirty-four years."

Even after plaintiffs in Alaska obtained a consent agreement requiring Alaskan officials to provide adequate language assistance to Yu'pik-speaking voters, the attorneys had to repeatedly return to court to provide fulsome relief. Documents produced in litigation showed that Alaskan officials made a "policy decision" not to comply with Section 203 in several jurisdictions, consciously choosing not to provide required

language assistance. In 2013, a group of tribal councils and Alaska Native voters charged Alaska state officials with continuing violation of the VRA and the Constitution for their refusal to provide information in Yu'pik that was available in English—in its ruling for the plaintiffs, the court confirmed that "officials" negligence had produced egregious results—Yu'pik voters were deprived of any and all critical pre-election information."

In *Toyukak*, Alaska election officials denied Native voters language assistance despite a previous court finding in *Nick v. Bethel* that all voting information provided in English must be provided orally even if written translations are not required. The court held in *Toyukak* that Section 203 should be interpreted as "merely changing the means by which voting information and materials is communicated to LEP American Indians and Alaska Natives, and Section 203 does not permit election officials to diminish the content and extent of information that must be provided." Mr. Campbell testified that the parties "worked together to produce a joint stipulation that aimed to remedy Alaska's Section 203 violations and included strong relief such as federal observers to document compliance efforts." Mr. Campbell testified further that:

"Reports filed by federal observers in 2016 suggest that Alaska's efforts fell short of fully remedying the Section 203 violations and complying with the *Toyukak* Order. . . During the 2016 primary, federal observers documented there were no voting materials available in the covered Alaska Native language in six villages, and the "I voted" sticker was the only material in a Native language in two other villages. Alaska has made some improvements since *Toyukak* such as having bilingual poll workers available, but almost forty years of Section 203 violations cannot be remedied overnight and continued investment in language assistance for American Indian and Alaska Natives is crucial to ensuring Native voters have equal access to the election process."

Alaska is not the only jurisdiction to have failed to comply with requirements to provide Native voters with language access. As Mr. Campbell's testimony notes, San Juan County, Utah, is a covered county for the Navajo language, but the County has failed voters by refusing to comply with Section 203. Additionally, in 2014 the County removed all language assistance by switching to a vote-by-mail system and providing no translated ballot information to LEP Navajo voters, many of whom received an English ballot they could not read and so they simply did not vote. A settlement reached between the County and litigators restored the closed polling places and mandates the County provide the required language assistance. Failure to provide access to Native language services has also impacted Native American voters in Arizona. Professor Patty Ferguson-Bohnee, Director of the Indian Legal Clinic at the Sandra Day O'Connor College of Law, testified before the Subcommittee in 2019 that in Arizona, in 2016, only one of nine jurisdictions covered under Section 203 for Native languages provided translated voter registration information in the covered language.

CONCLUSION

Congress has, at multiple junctures in history and in legislating, moved to protect the right to vote through increased access to language assistance. Congress recognized that access to multi-lingual voting materials and assistance is critical to ensuring fair and equal access to the ballot. While the language access provisions of the Voting Rights Act remain intact following the Court's decision in *Shelby County*, the evidence before

the Subcommittee in both this Congress and the last is clear—significant gaps remain in adherence to the law and the provision of fair access to multi-lingual voting materials and assistance.

The failure to provide the required assistance is pervasive and creates significant barriers to accessing the ballot, barriers that fall disproportionately on LEP voters, who are more likely to be minority voters. Additionally, as Jerry Vattamala of AALDEF testified, protecting access to language materials and assistance on a case-by-case basis is unsustainable and insufficient:

“Individual affirmative cases require a large amount of human and financial resources which limit the reach and scope of work that organizations like AALDEF can do. For example, in the *OCA v. Texas* case that AALDEF brought against the state of Texas for violating Section 208 of the Voting Rights Act, it took more than three years to litigate from client intake to final decision, and required hundreds of hours of attorney time.”

The evidence presented before the Subcommittee demonstrates that ensuring access to multi-lingual materials and assistance warrants increased protections.

CHAPTER SIX—POLLING PLACE CLOSURES, CONSOLIDATIONS, RELOCATIONS, AND LONG WAIT TIMES AT THE POLLS

BACKGROUND

Prior to the Supreme Court’s decision in *Shelby County*, states and localities in covered jurisdictions were required to notify voters well in advance of polling location closures, to prove those changes would not have a disparate impact on minority voters, and to provide data to the DOJ about the impact on voters. In the years since *Shelby County* was decided, states that were previously covered by the VRA have closed hundreds of polling locations.

Issues related to polling place locations, quality, accessibility, and ensuing long wait times to vote are, unfortunately, well-documented and pervasive. For example, at the Subcommittee’s 2019 listening session in Brownsville, Texas, Mimi Marziani, President of the Texas Civil Rights Project (“TCRP”) testified that, “long lines and late openings are, unfortunately, such a common feature of Texas elections that they are deemed ‘typical’ by election officials.”

Marcia Johnson-Blanco of the Lawyers’ Committee reported in testimony before the Subcommittee that, in Pennsylvania, two of the top three issues reported to Election Protection on Election Day 2020 were long lines, particularly in communities of color, and late polling place openings. Ms. Johnson-Blanco also noted issues of long lines being reported in Georgia, Texas, California, and Wisconsin throughout the 2020 primaries and general election.

Polling location closures and movements can and do disproportionately burden minority voters, whether by intent or effect. Poor polling place locations, lack of availability, and a lack of resources leads to minority voters facing longer lines than White voters at the polls. Polling place closures are harmful to voter turnout, especially the turnout of minority voters—waiting in a long line to vote can make a voter less likely to turn out in future elections. Disparities in Election Day experiences between minority voters and White voters are a persistent problem. Kevin Morris of the Brennan Center noted in testimony before the Subcommittee that “[o]ver the past decade, scholars have consistently noted that racial minorities wait longer to cast their ballots on election day than White voters.”

The disparity in polling place accessibility and wait times is then compounded by the

disparate impact of other practices discussed in this report such as voter ID accessibility, proper access to multi-lingual materials and assistance, voter purges, and restrictions on alternative opportunities to vote. As Ms. Marziani testified before the Subcommittee this Congress, “fewer polling places is one driver of long lines, a symptom of polling place inefficiencies that is compounded by other devices that make voting more onerous and time-consuming, such as Texas’ strict photo identification law (the same one originally struck down under Section 5).”

While there may be legitimate reasons for closing, consolidating, or moving polling locations, without the disparate impact data, community consultation, and evaluation to support these changes, there is no preemptive way to ensure these closures do not discriminate against minority voters. Polling place closures, consolidations, relocations, and under-resourcing can and do lead to longer or extreme wait times or can require voters to drive for miles to reach a polling place.

In Georgia, for example, Gilda Daniels of the Advancement Project testified at the 2019 field hearing that at the Pittman Park voting sites in 2018 they received calls that lines were “reportedly 300 people deep with a wait time of 3.5 hours.” The 2020 primary election in Georgia saw extremely long wait times yet again—voters waited in hours-long lines, some late into the night and the early hours of the next day. Counties are regularly sued to extend the hours of polling locations to ensure all voters can cast a ballot. Voters in Georgia waited in lines so long they brought chairs to wait for the opportunity to cast their ballot. Volunteers provided food and water to people who had to wait in line for hours.

Polling place locations that necessitate traveling long distances are particularly burdensome, and unfortunately an all-too-common occurrence, for Native American voters. Movement toward mail-in voting, closure of polling locations, lack of polling places located on tribal lands, and moves toward consolidated vote centers can disproportionately impact and possibly disenfranchise Native voters who face barriers such as lack of access to transportation, lack of traditional residential mailing addresses, lack of access to reliable mail service and distance. When fighting to ensure their communities have equal opportunities to vote, many tribal communities are at the mercy or discretion of county officials who choose where to place the polling locations and the level of ballot access.

Evidence presented before the Subcommittee at hearings spanning this Congress and the last, and discussed below, shows that pervasive polling place location issues, long wait times, and under-resourcing have a disproportionate, discriminatory, and suppressive effect on the ability of minority voters to freely and fairly exercise their right to vote.

THE DISPROPORTIONATE AND DISCRIMINATORY BURDEN AND IMPACT OF POLLING PLACE CLOSURES, CONSOLIDATIONS, AND RELOCATIONS, WAIT TIMES, AND LACK OF RESOURCES ON MINORITY VOTERS

Polling Place Availability and Accessibility

No matter the reason, polling place closures, consolidations, or relocations, or a lack of adequate resourcing can lead to long lines and extreme wait times or can require voters to drive for miles to reach a polling place. This burden often falls disproportionately on minority voters. Without the disparate impact data and analysis previously required under the Voting Rights Act preclearance process, community consultation, and evaluation to support these

changes, there is no longer a preemptive mechanism to ensure these closures do not discriminate against minority voters.

As Jesselyn McCurdy, Managing Director of Government Affairs for the Leadership Conference testified, “[v]oting discrimination and disenfranchisement takes many forms, but one tangible way to quash Americans’ voices is to physically remove the very locations where ballots are cast and counted. While they do not garner the attention that voter purges and ID laws do, polling place closures can be just as disenfranchising.”

One of the starkest examples of this occurred recently during the 2020 primary election, when voters in Milwaukee, Wisconsin, were forced to stand in line for hours at one of only five polling places open across the city to cast their ballot on Election Day, after failing to receive absentee ballots in the mail and just weeks after officials shut down 175 sites. The make-up of Milwaukee is disproportionately Black—Madison, a much less populous town with a whiter population, boasted 66 polling sites to Milwaukee’s 5.

According to an analysis by Demos and All Voting is Local, Milwaukee is home to 60.32 percent of Wisconsin’s Black voters and 29.69 percent of the state’s Hispanic voters. These polling place closures had a measurable disenfranchising effect. A peer-reviewed, journal article by the Brennan Center’s Kevin Morris and Peter Miller found that the closures in Milwaukee depressed turnout by more than 8 percentage points overall—and by about 10 percentage points among Black voters.

The disenfranchising effects of polling place closures or movements have been documented by studies as well. Studies have shown that the closure or relocation of a polling location reduces turnout by one to two percentage points, meaning that the closure or relocation of polling locations that disproportionately serve minority voters also serves to disproportionately reduce turnout of minority voters.

These burdens are attributable to the fact that the closures or relocations force voters to travel farther to vote, which can be particularly burdensome on Latino, Native American, Asian/Pacific Islander, and Black voters who disproportionately lack access to a private vehicle. Distances to polling locations can be particularly burdensome for Native American voters living on rural, tribal lands, with some voters being forced to travel tens of miles to reach their polling location. Accessible polling locations are also necessary for LEP voters to access the franchise, as some voters who need language access materials or assistance may need a physical polling place to best exercise their right to vote.

The closures of polling locations ticked up dramatically in states previously covered by the VRA following the Supreme Court’s decision in *Shelby County*. Ms. McCurdy testified that, without a fully functioning VRA and consistent oversight by the DOJ in reviewing proposed changes, election officials “have unfettered discretion to shut them down without providing any valid reason.” A September 2019 report prepared by the Leadership Conference Education Fund found that states and localities that were previously covered by Section 5 of the VRA closed 1,688 polling places between 2012 and 2018, almost double the rate identified in 2016. The Leadership Conference found that, in 2018 alone, there were 1,173 fewer polling places than there were in the previous 2014 midterm election. Another study found that by 2020 approximately 21,000 polling places that served voters on Election Day have been eliminated nationwide.

Through public records requests and data provided by the Center for Public Integrity,

the Campaign Legal Center (“CLC”) has continued to document polling place closures in Louisiana, Mississippi, and Alabama. For example, Danielle Lang, Director of Voting Rights at the Campaign Legal Center testified that:

“Since Shelby County, Louisiana has seen a steady decline in polling place access, especially for urban communities. For example, Jefferson Parish, Louisiana’s largest parish, has seen an 8.7 percent increase in the number of Black registered voters between 2012 and 2020 but a 15 percent decrease in the number of polling places.”

CLC also found that counties in Mississippi and Alabama displayed a similar pattern. For example:

“Lauderdale County, Mississippi—which is 44 percent Black—closed 20 percent of its polling places between 2012 and 2020, even though the county’s citizen voting age population increased by 3 percent. And Shelby County, Alabama—namesake of the Supreme Court decision—closed roughly 10 percent of its polling places between 2012 and 2020, despite an increase of almost 13 percent in the county’s citizen voting age population.”

Ms. McCurdy, of the Leadership Conference testified before the Subcommittee that “[p]olling place closures did not seem to vary to meet the different demands of each type of election; indeed, 69 percent of closures (1,173) occurred after the 2014 midterm election in anticipation of the presidential election, which would necessarily bring higher turnout in communities of color.” One would have reasonably expected the number of available polling places to increase to correspond to the anticipated higher turnout. Ms. McCurdy further testified, however, that “[t]his appears to be no accident: as pollsters predicted greater turnout for the 2018 midterm, counties with a history of discrimination began shutting down access to voting booths at an alarming rate.”

As noted previously, under Section 5, covered jurisdictions were previously required to demonstrate that closures would not have a discriminatory impact on voters, and to notify voters of the closures when they were permitted to occur. Now, post-Shelby, jurisdictions no longer need to notify voters of the change, nor is the DOJ required to analyze the impact of the proposed changes on minority voters. Ms. McCurdy testified that: “All told, Shelby County paved the way for several previously covered states to each shut down hundreds of polling places: Texas shut down 750; Arizona shut down 320; and Georgia shut down 214. Quieter efforts to reduce the number of polling places without clear notice or justification spread throughout Louisiana (126), Mississippi (96), Alabama (72), North Carolina (29), and Alaska (6).”

Over both the 116th and 117th Congresses, the Subcommittee heard testimony about how polling place closures can directly target locations predominantly used by minority voters.

For example, in Irwin County, Georgia, the Board of Elections attempted to close the only polling place in the county’s sole Black neighborhood, contrary to non-partisan recommendations, while keeping open a polling place in a 99 percent white neighborhood. In 2019, the City Council of Jonesboro, Georgia, voted to move the city’s only polling location to its police department without providing the public notice required and without taking into consideration the possible deterrent effect on minority voters. Ms. Romero-Craft of Latino Justice testified that Hall County, Georgia’s, decision to only reopen half of its early voting sites for the 2020 run-off election caused “substantial reductions and disproportionately burdened Latino voters.”

Mimi Marziani of the Texas Civil Rights Project testified that, the best available evi-

dence strongly suggests that many of the polling place closures that have taken place across Texas since Shelby County have disparately and negatively impacted communities of color. Ms. Marziani testified that, “[i]n short, history and current data confirm that voters of Texas are not evenly affected by the State’s detrimental changes to polling place locations, operations and hours. Instead, Black and Latinx Texans will suffer a heavier burden, as they have time and again.” Texas, a state with a population that is 39 percent Latino, 12 percent African American, and 1.4 percent Asian American, has closed 750 polling places since Shelby.

The Texas example is particularly egregious. Ms. Marziani provided data that hundreds of polling places were closed before the 2016 presidential election, “significantly more in both raw number and percentage than any other state.” In Galveston, Texas, 16 percent of its polling locations were closed in 2016, according to a plan that had initially been rejected by the DOJ because it discriminated against Black and Latino voters. Three Texas counties closed between 75 and 80 percent of their total polling sites, ranking among the 10 counties with the highest percentage of poll closures in the country.

Texas is not the only example. Ms. McCurdy testified that Arizona, a state where 30 percent of the population is Latino, 4 percent is Native American, and 4 percent is African American, has the most widespread reduction (–320) in polling places—“almost every county (13 of 15 counties) closed polling places after Shelby County—some on a staggering scale.” Ms. McCurdy’s testimony noted that these closures occurred despite national news coverage of “the adverse impact of polling place reductions in Maricopa County in the 2016 presidential preference election, which forced voters to stand in line for five hours to cast a ballot.”

Georgia—a state that is 31 percent African American, 9 percent Latino, and 4 percent Asian American—had 214 fewer polling places for the 2018 election than it did before Shelby. Ms. McCurdy stated that Georgia counties have closed higher percentages of voting locations than any other state the Leadership Conference reviewed for their Democracy Diverted report.

Gilda Daniels, the Director of Litigation at the Advancement Project, testified that her organization had collected data that, since 2012, Ohio had closed more than 300 polling locations across the state, a disproportionate number in urban areas. Furthermore, Ms. Daniels’ testimony notes that, between 2016 and 2018, Cuyahoga County (Ohio’s second largest county) eliminated 41 polling locations and nearly 16 percent of all precincts changed location, harming a majority of Black communities.

While some states are closing polling locations in the shift to the vote center model, the lack of preclearance requirements means these shifts are happening without the requisite analysis to ensure they do not discriminate against minority voters. Additionally, the shift to a vote center model does not necessarily explain all polling place closures.

For example, in Texas, Somervell, Loving, Stonewall, and Fisher counties all closed between 60 and 80 percent of their polling places without converting to a vote center model. According to Ms. Marziani’s testimony, each of these counties has a large Latinx population. Following the November 2018 General Election, TCRP conducted a comprehensive review of county compliance with provisions of the state Election Code and the Voting Rights Act—they found that many counties, regardless of size or polling place model, were out of compliance with elections laws. Texas was unlawfully short

as many as 270 polling places in a total of 33 counties that contained four million registered voters collectively in 2018.

Additionally, Kevin Morris of the Brennan Center, testified that although more than half of all states have statutes detailing minimum standards for the number of polling places, many states simply do not comply with their own laws. Mr. Morris stated that, for example, his team uncovered evidence that “more than 40 percent of precincts in Illinois had more registered voters assigned to than allowed under state law, as did nearly a quarter of precincts in Michigan.”

Standards for polling place locations can also be crafted in a way that is discriminatory toward minority voters. For example, Ms. Marziani testified that an earlier version Texas’ State Bill (SB) 7, which moved through the State House but has not been signed into law, included a provision that would have created a formula to distribute polling places that would pull polling places away from communities of color. Ms. Marziani testified that the Texas Tribune found that, of the 13 State House districts in Harris County that would lose polling sites under this formula, all but one has a majority non-white voting-age population.

At the time of this report, the Texas state legislature has returned for a special session, during which the Republican-led legislature is attempting to once again take up restrictive voting legislation. The bills moving through the State House and Senate contain numerous provisions that restrict access to the ballot and voting opportunities, including, for example, putting limitations on polling places so as to ban drive-thru voting options. Texas Democrats have departed the state to deny a quorum at the legislature in order to block the voting restrictions bill.

For Native American voters, the location of polling places, consolidations, and the distance to polling locations is a significant issue. In their 2020 Report, NARF wrote that “Native voters generally must travel greater distances to get to their polling places than non-Native voters living in the same counties.” NARF goes on to report that often, polling places are located in non-Native county seats or non-Native communities, and in many cases the more populous Native communities are denied in-person voting on tribal lands, requiring them to travel off the reservation to vote.

According to testimony from Professor Ferguson-Bohnee, Director of the Indian Legal Clinic at the Sandra Day O’Connor College of Law, in a 2018 survey conducted by the Native American Voting Rights Coalition found 10 percent of respondents in New Mexico, 15 percent in Arizona, 27 percent in Nevada, and 29 percent in South Dakota identified distance from polling locations as one of the many problems associated with in-person voting. When polling locations or voting opportunities are located hours away it effectively amounts to no access for Native American voters. Professor Ferguson-Bohnee notes that the federal district court in Nevada acknowledged this reality when it found that a polling location 16 miles away from the Pyramid Lake Paiute Reservation constituted an undue burden on voters.

Nevada is not the only state where Native American voters face a disproportionate burden when it comes to polling place access—in 2016, Native American voters in Nevada and Utah had to travel over 100 miles to their nearest polling locations. In Mohave County, Arizona, most residents in the County lived near one of the 3 locations established for in-person early voting, however, for the Kaibab-Paiute Tribe the closest of the three locations was 285 miles away and required on-reservation voters to travel for over 5 hours if they wanted to vote early in person.

In October 2020, NARF and the ACLU of Montana filed suit against Pondera County election officials on behalf of Blackfeet Nation for failing to provide a satellite voting location on the reservation, depriving Tribal members of the same access to voting as White voters. According to the ACLU of Montana, the County offered in person voting between 60 to 80 miles away for Blackfeet Nation residents in the county seat—the suit resulted in a settlement agreement three days after filing in which Pondera County agreed to establish a satellite election office in Heart Butte.

At the Subcommittee's 2019 hearing in the Dakotas, Roger White Owl, Chief Executive Officer of the Mandan Hidatsa and Arikara Nation, testified that MHA Nation does not have enough polling places, “[w]ith only a couple of polling places, many Tribal members had to drive 80 to 100 miles round trip to cast their vote. This is unacceptable.”

Long Wait Times and Inadequate Resourcing at the Polls

When minority voters do cast their ballot at a polling place, they are also more likely to face longer lines and wait times to do so. Dr. Stephen Pettigrew of the University of Pennsylvania testified before the Subcommittee that:

“The most basic impact of waiting in a line is the time burden placed upon the voter—what has been referred to as a ‘time tax.’ Compared to those who live in areas with consistently short lines, voters who live in areas with chronically long lines must sacrifice more of their time to exercise their right to vote. This can be a particular burden for people who have less flexibility in their schedule, whether because they have constraints in their work schedule or because they have childcare or eldercare responsibilities.”

Furthermore, Kevin Morris of the Brennan Center testified that, “[o]ver the past decade, scholars have consistently noted that racial minorities wait longer to cast their ballots on election day than White voters.”

Not only do minority voters face, on average, longer wait times, they also are more likely to experience wait times exceeding 60 minutes, a wait widely recognized as unacceptable, with one analysis finding that a voter living in a non-white neighborhood is more than 6 times more likely to wait 60 minutes or more to vote than a voter living in a predominantly White neighborhood.

In testimony before the Subcommittee, Dr. Pettigrew stated that, “[a] voter’s race is one of the strongest predictors of how long they wait in line to vote: non-white voters are three times more likely than White voters to wait longer than 30 minutes and six times as likely to wait more than 60 minutes.” Dr. Pettigrew’s testimony and research also find that line length is a persistent and systemic problem—the same places with long lines in one election are more likely to have long lines in subsequent elections.

Furthermore, Dr. Pettigrew’s research finds that the wait times gap between White and non-White voters bridges the simple explanation of a rural-urban divide, though that divide also exists. Dr. Pettigrew testified that, even within a given urban, suburban, or rural county, lines tend to be longer in neighborhoods and precincts with higher concentrations of non-White voters.

A report by the Brennan Center shows similar outcomes. Mr. Morris testified that the gaps cannot be explained solely by differences in income, age, or education, and that the gaps are large, stating, “our report showed that in 2018, Black and Latino voters were more than one- and-a-half times as likely to wait 30 or more minutes as White

voters.” According to the Brennan Center, in the 2018 election, for example, 6.6 percent of Latino voters and 7 percent of Black voters reported waiting 30 or more minutes or longer to vote on Election Day, whereas only 4.1 percent of White voters reported waiting 30 minutes or more.

Additionally, in a recent report on equity in our democracy, the Brennan Center further reported:

“A 2020 analysis by the Brennan Center reported that Latino and Black voters were more likely to find themselves in the longest lines on Election Day than their White counterparts: ‘Latino voters waited on average 46 percent longer than White voters, and Black voters waited on average 45 percent longer than White voters.’ Stanford University political science professor Jonathan Rodden analyzed data collected by Georgia Public Broadcasting/ProPublica and found that the average wait time after 7:00 p.m. across Georgia was 51 minutes in polling places that were 90 percent or more nonwhite, but only six minutes in polling places that were 90 percent White.”

Ms. Marziani further highlighted this in her testimony, stating that, in Texas for example:

“Press reports indicated wait times as high as seven hours, ‘particularly in communities of color and on college campuses.’ . . . Nationally, communities of color regularly wait nearly twice as long to vote as White voters, and in Texas, too, long lines disparately impact Black and Latinx Texans.”

Additionally, Keith Chen of the University of California, Los Angeles, found voters in Black neighborhoods waited longer to cast a ballot than voters in White neighborhoods, and were approximately 74 percent more likely to wait longer than half an hour. Using data from the 2008 and 2012 elections, multi-state internet surveys of tens of thousands of voters revealed that both African American and Hispanic voters faced substantially longer wait times at the polls than White voters. Other state-specific studies have shown that minority voters face disproportionately long lines relative to White voters.

According to a report in the New York Times, this disparity continued in the 2020 election—“casting a vote typically took longer in poorer, less white neighborhoods than it did in whiter and more affluent ones.”

Ms. McCurdy of the Leadership Conference also testified to this point. Ms. McCurdy stated that:

“In previously covered jurisdictions, moreover, mass closures similarly resulted in long lines: In 2020, voters stood in line for hours in Phoenix, Arizona, and Atlanta, Georgia; Texas’ shuttering of 334 polling places—more than any other state—in majority- Latino neighborhoods forced voters to drive farther than White people from other areas. Indeed, across the country Black and Latino voters consistently reported longer wait-times than White voters.”

Scholars and stakeholders have demonstrated that the disproportionately long wait times faced by minority voters are often attributable to the differentially lower quality of the polling locations that serve a disproportionately large number of minority voters. For example, Dr. Pettigrew’s testimony states that “one of the reasons why non-White voters wait longer to vote is that fewer resources, such as poll workers and voting machines, are allocated to precincts with more non-white registrants.” Studies have shown that election officials provide more poll workers and voting machines to disproportionately White precincts, relative to precincts that serve minority voters. A study by the Brennan Center showed that

counties that saw a declining population of White voters also saw declines in polling location resources, with counties where the population became whiter having 63 voters per poll worker, whereas counties that were becoming less White had 80 voters per poll worker.

Equal distribution of resources alone, however, is not enough to address the disparate experience of minority voters. Mr. Morris testified that

“Equalizing the distribution of polling place resources, in other words, is insufficient to equalize voters’ experience on Election Day. To ensure equitable Election Day experiences and end the excessive lines and wait times faced by minority voters, administrators need to distribute relatively more and higher-quality resources to neighborhoods of color.”

Mr. Morris further stated that, “although voters of color already face the longest lines, on average, they make up a growing share of the jurisdictions with the fewest electoral resources” and that “resource allocation patterns are on track to exacerbate, not mitigate, the racial wait gap in coming years.”

Additionally, as noted elsewhere in this report, long wait times can be compounded by the disparate impact of the other practices discussed in this report. Mr. Morris testified for example, that the dynamic of inadequate resources “plays out especially clearly when it comes to language access.” Mr. Morris testified that research at the Brennan Center “indicates that counties that have significant and growing populations of voters whose first language is not English, but have not met the threshold to provide language assistance under Section 203 of the VRA, usually provide little-to-no language assistance, leaving some communities under-resourced.” Voter purges that remove eligible voters from the rolls may cause delays at the polling place as poll workers take time trying to locate the voter’s record, and purged voters are often required to cast provisional ballots—Mr. Morris testified that voters who cast a provisional ballot can take twice as long to cast their ballot as a traditional ballot.

In addition to imposing direct burdens on minority voters, longer wait times also impact the likelihood that a voter will vote in later elections, thereby disproportionately impacting and suppressing participation among minority voters. Voters who face long lines in one election are disproportionately likely not to vote in a subsequent election because of their adverse experience with the voting process. This means that when minority voters face disproportionately long wait times in one election, then these same voters are disproportionately likely not to turnout in subsequent elections.

Dr. Pettigrew testified that, “[b]ecause voters’ experiences at the polling place have downstream consequences on their future turnout behavior and their confidence in the electoral system, policies that widen the wait time gap between White and non-white voters have the potential to put a thumb on the electoral scale by reshaping the electorate.”

For example, one study estimated that whereas African American voters comprise 9.7 percent of the electorate, they accounted for 22 percent of the voters who voted in 2012 but did not turnout in the 2014 election because of their adverse experience with long wait times.

Dr. Pettigrew testified that, “[v]oters who waited between 30 and 45 minutes to vote were 1 percentage point less likely to turn out to vote in the next election, compared to voters who waited less than 15 minutes. When considering voters who waited more

than 60 minutes, this impact increases to about 1.6 percentage points.” Dr. Pettigrew notes that, “[w]hile these percentages may seem small, it is important to remember that in many elections million or tens-of-millions of voters experience long lines, meaning that future decreases in turnout can be in the hundreds-of-thousands.”

CONCLUSION

The evidence before the Subcommittee clearly illustrates the disproportionate, discriminatory effect polling place closures, consolidations, and relocations and under resourcing has on access to the ballot for minority voters. The 2013 bipartisan Presidential Commission on Election Administration set out a key recommendation that “as a general rule, no voter should have to wait more than half an hour in order to have an opportunity to vote”—the evidence presented to the Subcommittee clearly shows that states and localities are falling far short of this, with minority voters disproportionately bearing the burden.

As Danielle Lang, Director of Voting Rights at the Campaign Legal Center stated, “[t]he quality of polling places—their number, location, accessibility, and resources—affects voter participation and confidence, thereby affecting the health and representative nature of American democracy.” The Supreme Court recognized as much, as Ms. Lang testified, confirming that “the location and accessibility of polling places can have a direct impact on a voter’s ability to exercise their fundamental right to vote. Litigation is simply an inadequate remedy to combat the scale of polling place closures and to combat the significant harm borne disproportionately by minority voters. The data shows these issues are pervasive and have a significant suppressive effect on voters, demanding heightened scrutiny and protections to ensure every voter has access to the franchise.

CHAPTER SEVEN—RESTRICTING OPPORTUNITIES TO VOTE

BACKGROUND

The 2020 general election was yet another proof point in what we knew to be true about administering elections in America—when voters are given a variety of options for when and how to cast their ballot outside of traditional in-person Election Day voting, they take advantage of those options. These options include casting a ballot by utilizing early in-person voting, curbside or drive-thru voting options, mail-in voting, or placing a completed ballot in a drop box. Undeniably, voting in-person on one Tuesday in November is impractical or impossible for millions of Americans.

Each of these alternative options are also secure. Election administrators across the country proved during the 2020 and prior elections that they can be administered in ways that reinforces the integrity of our elections even when utilized at record levels. Cybersecurity and election security officials, in fact, stated that the 2020 election was “the most secure in American history.”

Early voting, and especially weekend early voting, is a critical tool to ensuring access to the ballot and reducing wait times at the polls. Absentee or no-excuse/mail-in voting is also crucial to providing voters with options for casting a ballot. In testimony submitted before the Subcommittee, Gilda Daniels of the Advancement Project stated, “[i]t has been proved that expanding early voting, vote by mail ballots, and drop box return options decrease the cost of voting” and making these options widely available can assist with turnout and smooth election administration.

Studies have shown that restrictions on a variety of alternatives to voting in-person on

Election Day have the potential to disproportionately burden minority voters. Moreover, restricting alternative opportunities to vote burdens Latino and Black voters, who disproportionately lack the ability to shift their working hours, and therefore are less able to vote on Election Day. Restricting voting options can also burden Native American voters, who have non-traditional mailing addresses, long distances to travel to polling locations, often lack transportation, and can have inconsistent access to mail services. Failure to provide adequate language assistance also impedes the ability of LEP voters to fully understand and take advantage of voting options such as absentee voting or assessing what early voting options are available.

While a variety of options for casting a ballot outside of the traditional Election Day are being utilized with increasing frequency by all voters, including minority voters, that increased use has also made these opportunities to vote the subject of targeted, suppressive voting laws in the post-Shelby era.

Michael Waldman of the Brennan Center testified that multiple states have reduced early voting days or sites used disproportionately by minority voters, such as in Ohio and Florida, where legislatures eliminated early voting on the Sundays leading up to Election Day after Black and Latino voters conducted successful “Souls to the Polls” turnout drives on those days. Federal courts struck down early voting cutbacks in North Carolina, Florida, and Wisconsin because they were intentionally discriminatory. Similar efforts are underway today, cutting or restricting early voting, mail-in voting, and ballot return methods, which will disproportionately impact and burden minority voters.

Under the false flag of “election integrity” and combating fraud, as of July 14, 2021, more than 400 bills have been introduced by lawmakers in 49 states to curb access to the vote. As of the writing of this report, at least 18 states have enacted new laws containing provisions that will restrict access to voting and opportunities to vote.

The Brennan Center reports that at least 16 mail-in voting restrictions in 12 states will make it more difficult for voters to cast mail ballots that count and at least eight states have enacted 11 laws that make in-person voting more difficult. These laws come on the heels of an election in which reports show that the share of voters casting mail-in ballots far exceeded any other recent national elections, and the share of voters who reported going to a polling place on Election Day dropped to its lowest point in at least 30 years. According to a report by the Brennan Center:

“Compared to 2016, Latino voters in 2020 quadrupled their participation in early and absentee balloting—a 224 percent increase, compared to a 165 percent increase for early and absentee ballots cast by voters overall. In the 13 most contested battleground states in the 2020 election, Asian American and Pacific Islander voters saw their early and absentee voting rise nearly 300 percent from 2016 levels.”

Laws enacted in Arkansas, Florida, Georgia, Iowa, and Montana restricting access to the ballot are already being challenged in court.

Evidence presented before the Subcommittee across numerous hearings clearly illustrates that the cuts made to opportunities to vote have a disproportionate and discriminatory impact on minority voters and, in some cases, are pursued with a provable discriminatory intent.

CUTBACKS AND RESTRICTIONS ON OPPORTUNITIES TO VOTE AND THE DISCRIMINATORY AND DISPROPORTIONATE BURDEN AND IMPACT ON MINORITY VOTERS

More than three-quarters of states offer some in-person early voting, but the number of days of availability varies across the nation. Despite the widespread, successful, secure use of early in-person voting in states across the country, early voting options have become the target of suppressive restrictions in the post-Shelby era.

Cutbacks and restrictions on opportunities to vote outside of what is considered traditional Election Day voting places a disproportionate burden on minority voters. Options such as early voting, mail-in voting, curbside voting, and drop boxes for ballot return all increase voter participation and were used at increasing rates by minority voters during the 2020 primary and general election.

Danielle Lang, Director of the Voting Rights Program at the Campaign Legal Center testified that, in 2020, polls showed that Black voters were the most likely to cast an early ballot and in 2016, Latino voters were the most likely to cast an early ballot. Yet, without the requirement of preclearance to study and analyze changes in opportunities to vote for disparate impact, each of these voting options have become the target of suppressive and discriminatory cutbacks by state legislatures across the country.

Dr. Pettigrew testified before the Subcommittee that the number of options and opportunities voters have to cast their ballots is also a major contributor to the length of lines at the polls, a burden that the previous section of this report clearly demonstrated falls disproportionately upon minority voters. Increasing hours of operation at polling places, increasing the number of days of early voting, and providing broader access to mail-in voting all decrease line length and provide voters with opportunities to participate in democracy that meet them where they are in their daily lives.

Early In-Person Voting

Dr. Michael Herron of Dartmouth College testified before the Subcommittee that options such as early in-person voting are a form of “convenience voting,” the implementation of which decreases the cost of voting for the voter. Dr. Herron explains that “cost” in this sense “refers not necessarily to a monetary cost of participating in an election that would be borne by an individual but rather to the time, effort, and tasks that a voter must perform in order to vote.” As he explained further, “[t]he higher the cost of voting in a state, the lower the turnout tends to be, all things equal.”

Dr. Herron testified that early voting has expanded across the United States over the past several decades and, in this same time period, has been heavily used by minority voters. Dr. Herron testified that, “[c]ertain types of voters tend to use different days of early voting,” and for this reason, “changes to election administration procedures that affect precisely when early voting is offered—i.e., on weekdays only as opposed to on both weekdays and weekends—will affect different racial groups differently.” He testified further that, “changes to early voting hours that reduce pre-Election Day, Sunday voting opportunities should be expected to disproportionately affect Black voters” and that, if a state were to eliminate Sunday early voting, “the cost of voting for Black voters would disproportionately increase compared to White voters given the relatively heavy use of Sunday early voting by Black voters.”

One of the most striking examples of how changes and cutbacks to opportunities to

vote can be wielded to disenfranchise minority voters comes again from North Carolina's 2013 omnibus voting bill, dubbed the "monster law." A study co-authored by Dr. Herron examining the discriminatory impact of the state's 2013 voting law, which, among other restrictions, cut 10 days of early voting, eliminated same-day voter registration, and eliminated out-of-precinct voting and was enacted within days of the Supreme Court's decision in *Shelby County*, found that in virtually every election between 2009 and 2012, Black voters disproportionately relied on early voting relative to White voters. Accordingly, the law's restrictions on early voting disproportionately burdened Black voters.

The North Carolina law specifically targeted one of two "Souls to the Polls" Sundays, early voting events traditionally held the Sunday before Election Day and heavily utilized by Black faith communities to get voters to the polls. The omnibus law was found by the courts to have targeted African American voters with "almost surgical precision." As Ms. Lang noted in her testimony, the Fourth Circuit Court of Appeals labeled the restriction on Sunday voting "as close to a smoking gun as we are likely to see in modern times."

Allison Riggs of the Southern Coalition for Social Justice testified that North Carolina's attacks on early voting access did not end with the 2013 law. In 2018, North Carolina's legislature enacted a separate law requiring all 100 counties within the state to offer uniform voting hours. While sounding innocuous in theory, in practice it:

"[H]ad a terrible effect on the ability of voters, particularly those of color, to get to a polling place. After the enactment of the 'uniform hours requirement,' 43 of North Carolina's 100 counties eliminated at least one early voting site, almost half reduced the number of weekend days when early voting was offered, and about two-thirds reduced the number of weekend hours, compared to 2014."

Tomas Lopez of Democracy North Carolina testified before the Subcommittee in 2019 that, "this has produced several consequences in practice . . . [o]f the eight counties where a majority of voters are Black, four reduced sites, seven reduced weekend days, and all eight reduced the number of weekend hours during early voting. None saw increases in sites or weekend options."

Like North Carolina, Florida has engaged in a lengthy effort to restrict voting options predominately used by minority voters. A study co-authored by Dr. Herron, analyzing differential use of early voting in Florida, found that Black voters disproportionately voted early relative to White voters. Ms. Lang testified that, in 2011, Florida's legislature passed a bill eliminating Sunday voting on the Sunday immediately preceding Election Day—the bill coming after data from the 2008 Presidential election showed that:

"Across all early voting days, the two days that featured the lowest white participation rates . . . both were Sundays, but on the first Sunday of early voting, the racial and ethnic group with the highest relative participation rate was African-American voters. And on the last Sunday, the group with the highest relative participation rate was Hispanic voters, followed by African-American voters."

Because of Black voters' disproportionate reliance on early voting, scholars found that Florida's restriction on access to early voting in 2012 meant that "racial and ethnic minorities . . . were far disproportionately less likely to vote early in 2012 than in 2008." That was particularly true because African American voters were disproportionately

likely to vote on the final Sunday before Election Day, which was among the early voting days eliminated by the law, as part of "Souls to the Polls" get-out-the-vote efforts.

Also in Florida, in July 2018, a federal court struck down a state ban on early voting at public colleges. Hannah Fried, National Campaign Director of All Voting is Local, testified before the Subcommittee in October 2019 that a post-election analysis published by the Andrew Goodman Foundation found that "nearly 60,000 voters cast early in-person ballots at campus sites that advocates, including [All Voting is Local], helped secure" in the aftermath of the court's decision, however, Florida's only public historically Black university was the only major public campus without an early voting site.

An examination of on-campus early voting in the 2018 election performed by Professor Daniel Smith of the University of Florida found high rates of campus early voting among Hispanic and Black voters. Moreover, Professor Smith found high rates of campus early voting among historically disenfranchised groups, including:

"[A]lmost 30 percent of campus early vote ballots were cast by Hispanic voters, compared to just under 13 percent of early ballots cast at non-campus locations, and that more than 22 percent of campus early vote ballots were cast by Black voters, compared to 18 percent of early ballots cast at non-campus locations."

Ms. Lang testified that, in 2014, data from Georgia and North Carolina similarly showed that 53 percent of 25,000 early votes cast on the second Sunday before Election Day were from Black voters, compared with 27 percent of the votes cast by all early voters in the 2014 midterm elections.

In Texas, just before the 2018 election, the NAACP Legal Defense Fund filed a motion for a temporary restraining order on behalf of Black students at the historically Black university Prairie View A&M University ("PVAMU") in Waller County, Texas. In 2018, the students sought to stop cuts to early voting hours, which would have left Prairie View without any early voting opportunities on weekends, evenings, or during the first week of early voting.

Janai Nelson, Associate Director-Counsel of LDF, testified to the Subcommittee that county officials refused the student requests to provide adequate early voting sites or hours and that County officials have "long discriminated against Black voters at PVAMU and in the majority—Black City of Prairie View, dating back to at least the early 1970s." In response to LDF's ongoing case, however, county officials agreed in 2018 to add several hours of early voting in Prairie View. LDF continues to litigate this case under its Section 2, Fourteenth, Fifteenth, and Twenty-sixth Amendment claims on behalf of PVAMU students who were still denied equal and adequate voting opportunities in the election under the modified plan and parties are awaiting the trial court's decision.

In yet another example, in Dodge City, Kansas, voting was limited in 2018 to one polling location, which was outside of town and inaccessible via public transportation—Dodge City's population is "60 percent Hispanic, and the voter turnout among Latinx voters is lower than the national average." Alejandro Rangel-Lopez, a high school student from Dodge City, testified before the Committee in 2019 that:

"Dodge City only had one polling place for nearly 13,000 voters and while that's bad enough to make it one of the most burdened polling places in our state, it was at the very least, centrally located, which can't be said about the location chosen for the 2018 mid-

term election. That new location was south of town, outside the city limits. Worse, the county clerk sent out the wrong location address to new voters. [T]his new site wasn't accessible by public transportation before we raised concerns. We believed these factors would negatively impact minority and low-income voters . . . We rely on our elected officials to make the right choices and for a county clerk, that job was to make voting as easy as possible in the county she represents. Unfortunately, that's not what happened. The clerk spent nearly \$100,000 of taxpayer money for legal fees fighting our efforts to make polling places more accessible."

In Ohio, in addition to other cuts to voting opportunities, the state allows each county only one early, in-person voting site, regardless of population size—meaning Franklin and Cuyahoga Counties, home to Columbus and Cleveland, with populations of more than 1.2 million people each and significant populations of Black voters, are allotted the same, single early voting site as the smallest counties in the state, some of which are home to less than 15,000 people. Inajo Davis Chappell, a Member of the Cuyahoga County Board of Elections, testified before the Subcommittee in 2019 that, "[b]ecause of the limit to this one location, voting lines are long, especially during the presidential election cycle. During periods of heavy voting, long lines can be seen wrapped around the building and down the street for several blocks."

LDF's report, *Democracy Diminished*, notes an example of a Georgia state legislator making the intent behind his opposition to certain early voting in minority communities clear—when an early voting site was opening near a popular mall in Dekalb County in 2014, a state senator responded that "this location is dominated by African American shoppers and it is near several large African American mega churches," and that he would "prefer more educated voters than a greater increase in the number of voters."

Cuts to early voting locations and opportunities to vote also negatively impact the ability of Native American voters to access the ballot. In NARF's 2020 report on obstacles faced by Native American voters, they state that early voting can be a positive force for Native voters, if it accounts for the barriers that they face in participating in non-tribal elections—when officials coordinate with tribal governments and schools to provide information about voting locations and schedule, it can improve turnout.

Professor Ferguson-Bohnee testified that, while some election administrations are willing to work with tribes to increase access, others are not. The Pascua Yaqui Tribe in Arizona, for example, filed a lawsuit to restore the in-person early voting location on the reservation—and "[w]hile Pima County noted that the voting location would have cost \$5,000 to operate, and the Secretary of State was willing to cover the cost, the County denied the Tribe an early voting location." Professor Ferguson-Bohnee stated that, without the early voting location, "on-reservation voters who lacked a vehicle were required to take a two-hour roundtrip bus ride to cast an early ballot."

In South Dakota, a federal district court found that Pine Ridge Reservation residents "must travel, on average, twice as far as White residents to take advantage of the voter registration and in-person absentee voting services." In another example, NARF reported that, in Oklahoma, there is often only one early voting location per county—in the county seat—which is often not accessible for Native voters living in outlying areas, and "in the poorest areas of Nevada, where several reservations are located, no

early voting or satellite voting locations were established.”

Furthermore, in the 2016 general election in Arizona, there were a total of 89 early voting locations, only 23 of which were on reservations. While off-reservation locations were open for multiple days, in contrast, early voting locations on the White Mountain Apache and San Carlos Apache reservations had only one day to vote early in-person, and only four hours on that one day.

Professor Ferguson-Bohnee’s testimony stated that, in Mohave County, Arizona, the county established three in-person early voting sites, and while most residents of the County lived near one of the locations, for the Kaibab-Paiute Tribe, the closet of the three locations was “located 285 miles away and required on-reservation voters to travel for over five hours if they wanted to vote early in-person.” In Navajo County, off-reservation voters had access to more than 100 hours of in-person early voting—while members of the Hopi Tribe living on-reservation in the County had access to only six hours of in-person early voting. That represents only six percent of the amount of in-person voting opportunities on-reservation voters could access compared with off-reservation voters.

Increasing the options for how voters can vote early in-person can also increase voter participation and participation of minority voters. For example, Isabel Longoria, Elections Administrator for Harris County, Texas—home to Houston and the third largest county in the country—testified that the historic turnout of 1.68 million voters Harris County experienced in the November 2020 election was driven by innovative voting opportunities such as drive-thru voting (128,000 votes), 24-hour voting (16,000 votes), and a robust mail ballot program (179,000 votes), and that these methods of voting “helped promote voting in minority communities, which helped create a more accurate representation of communities in the county.”

Ms. Longoria testified that during the July 2020 and November 2020 elections, Harris County also kept its polls open until 10:00 p.m. on two evenings and open the entire night one evening. Ms. Longoria testified that, of the Harris County voters who used expanded hours, 45 percent came from State House districts that are majority or plurality Black, Hispanic, or mixed-race districts.

Harris County also opened multiple drive-thru voting sites that provided voting on the same machines and in the same manner as voting at all other in-person locations. Of the voters who used in-person drive-thru voting, 60 percent came from the majority or plurality Black, Hispanic, or mixed-race State House districts. Though only 38 percent of early voters in the 2020 Presidential election were Black, Latino, or Asian, 53 percent of those communities used drive-thru voting. However, instead of promoting and celebrating these opportunities to vote, state legislators in Texas are also pursuing a suppressive voting bill that would undermine many of these alternative methods of voting.

Gilda Daniels, Director of Litigation at the Advancement Project, testified that voting statistics show that, in the November 2020 general election, Black voters in Georgia also used early voting on weekends at a higher rate than White voters in 43 of 50 of the state’s largest counties. That is 86 percent of the largest counties. The state also recently passed a restrictive bill that, among numerous troubling provisions, takes aim at access to early voting.

Mail-in Voting and Ballot Return

Whether cast via the mail, returned via a ballot drop box, or returned at a polling place, mail-in voting is another opportunity

to vote that gives voters control over when and how to cast their ballot that increases access to the franchise. Equitable mail-in voting practices increase voter participation; however, both restrictions on mail-in voting and mail-in voting implementation can be executed in a manner that is discriminatory toward minority voters or disproportionately burdens minority voters. Ms. Lang testified that “[a]bsentee voting is one of the most accessible, equitable, and secure methods of voting that states can implement.” However, access to mail-in voting options is highly uneven—from 5 states that conduct vote-by-mail elections, to many who offer no-excuse absentee voting, to the 16 states that continue to limit access to mail-in voting options, locking many voters out of this option.

Use of mail-in voting increased significantly during the November 2020 election—approximately 43 percent of voters cast mail-in ballots, roughly twice the percentage of voters who cast mail-in ballots in the 2016 general election.

Dr. Herron testified that this increase was not uniform across racial groups. For example, Dr. Herron noted that the shift in the mail-in voting rate in Florida for Black voters increased from almost 21 percent to around 39 percent, an 89 percent increase, while the rate for White voters went from 31 percent to 44 percent, a 43 percent increase. Dr. Herron testified that, while it remains to be seen whether mail-in voting usage will return to pre-pandemic levels, “[c]hanges to [vote-by-mail] voting procedures should not [be] expected to be racially neutral any more than changes to early voting procedures.”

The inequitable access to mail-in voting options and different eligibility rules were put in stark relief during the 2020 election, a presidential primary and general election conducted during a once-in-a-century pandemic. For example, Ms. Lang testified that Texas’s restrictions on eligibility for requesting and casting an absentee ballot “den[ies] the majority of Texans the ability to vote by mail—particularly Latino and younger voters.” Ms. Lang testified that “Latino voters in Texas are significantly younger than the average Texas voting population, which means they are disproportionately unable to avail themselves of the over-65 exception to the absentee eligibility criteria.” In May 2020, in Texas, CLC moved to intervene on behalf of the League of United Latin American Citizens (LULAC) in a lawsuit filed by the Texas Democratic Party challenging Texas’s vote-by-mail eligibility restrictions—the case remains pending in federal court.

Some states have also erected unduly burdensome requirements for casting absentee ballots that make the option illusory for many voters. For example, Alabama requires voters to send an application for an absentee ballot for every election to a special absentee election manager for the county, including a photocopy of their voter ID, and then return the ballot with a notary signature or the signature of two witnesses. In Mississippi, the application to vote by mail-in ballot must be notarized.

In another example, Ms. Lang testified that “[f]rom start to finish, Tennessee makes vote by mail unduly difficult and inaccessible.” CLC has several lawsuits pending in Tennessee, two of them, Ms. Lang notes, particularly relevant to minority voters’ opportunities to vote. CLC is challenging Tennessee’s strict limitations on who can vote by mail and the state’s failure to allow voters to fix issues with their absentee ballots after they are rejected due to a perceived signature mismatch.

Additionally, Tennessee law does not allow most first-time voters to vote by mail even

if they otherwise qualify under the state’s strict eligibility criteria. Ms. Lang testified that, “[t]hus, new voters—who are disproportionately young and of color—are locked out of absentee voting even when they have no way to present themselves to vote in person.” Allison Riggs of the Southern Coalition for Social Justice testified that “[t]he five states that did not allow unfettered access to vote-by-mail in 2020—Tennessee, Texas, Mississippi, Indiana, and Louisiana—were in the bottom 10 in turnout country-wide.”

Additionally, when a voter does vote by mail-in ballot, often there is no guarantee the ballot will be counted, as election officials often have the discretion to reject a ballot if they perceive discrepancies in the voter’s signature. Ms. Lang testified that “signature matching” has been shown to “disproportionately discount the ballots of voters with disabilities, older voters, and voters who are non-native English speakers or racial minorities.” Ms. Diaz of the UCLA Latino Policy and Politics Initiative also testified that, “signature matching requirements for mail ballots create a potential to disenfranchise Latino voters” and “[u]ltimately, mandatory signature matching is likely to have a disproportionate effect on the young, elderly, disabled, racial/ethnic minorities, and limited English proficient voters.”

If not implemented in conjunction with in-person voting options and in consultation with tribal governments, mail-in voting can replicate many of the same barriers and distance issues faced by Native voters. A lack of traditional addresses, inconsistent access to postal services, and distance all create barriers to fully accessing mail-in voting for many Native American voters.

The use of drop boxes or allowing a third-party to return a voter’s mail-in ballot have also been the target of restrictions in recent years. Ms. Lang testified that last year, approximately 41 percent of voters who voted absentee used ballot drop boxes, just 3 percent less than the percentage of voters who returned their ballot using the Postal Service. Yet, despite widespread, secure usage of drop boxes, states such as Texas moved to restrict the ability of voters to return their ballots via drop box—during the election the Governor of Texas issued an order restricting counties to one drop box per county and forcing counties that had deployed more than one to remove them.

Ms. Lang testified that “[t]his eleventh-hour decision to limit access to safe ballot drop-off locations so close to the election sowed mass confusion. Moreover, it disproportionately affected Black and Latino voters living in major metro areas and voters who were entitled to vote by mail because they were older or had disabilities.” The Governor’s order forced highly populous, majority-minority counties like Harris County, which has 4.7 million residents (more than 26 states) to cut their drop off locations from the 12 they had set up over roughly 1,700 square miles to one. These restrictions harmed minority voters in both populous counties and rural counties like majority-minority Brewster County on the Texas-Mexico border.

A lack of convenient access to drop boxes to return mail-in ballots was a consistent barrier for Native voters, as noted in NARF’s 2020 report. All too often, drop boxes are located off tribal lands, in some cases great distances from Native American communities. Bans on ballot return also disproportionately harm Native American voters. Many Native Americans rely on P.O. boxes that are often far from their homes. As detailed by NARF, families commonly “pool” their mail, meaning “one person who is

going to town would collect it for everyone else to drop off at the post office.”

Also, some people who cannot afford a P.O. box will have their mail sent to someone else who does have one, meaning if the mail contains an early ballot, depending on the law, that neighbor could be implicated in a banned ballot collection practice. NARF, along with the ACLU and the ACLU of Montana is currently challenging two new Montana laws that hinder Native American participation in voting, including one that attempts to block organized ballot collection on rural reservations. In September 2020, a Montana court permanently struck down a different state law, the so-called Montana Ballot Interference Prevention Act (BIPA), which imposed severe restrictions on ballot collection efforts critical to Native Americans living on rural reservations. In its order, the court held that the costs borne by Native American communities associated with BIPA were “simply too high and too burdensome to remain the law of the State of Montana.”

Recent Attacks on Opportunities to Vote

Despite the record-setting voter turnout experienced in 2020 and the secure nature in which the election was conducted, attacks on opportunities to vote are well underway in many states. According to the Brennan Center for Justice, at least 16 mail voting restrictions in 12 states will make it more difficult to cast mail ballots that are counted and at least 8 states have enacted 11 laws that make in-person voting more difficult. According to the Brennan Center’s state law roundup:

“Three states have limited the availability of polling places: Montana permitted more locations to qualify for reduced polling place hours; Iowa reduced its Election Day hours, shortened the early voting period, and limited election officials’ discretion to offer additional early voting locations; and Georgia reduced early voting in many counties by standardizing early voting days and hours.”

In Florida, Governor Ron DeSantis signed into law a bill that makes it more difficult to vote by mail-in ballot and makes it harder for voters to access secure drop boxes. On May 6, 2021, the NAACP LDF filed a lawsuit on behalf of the Florida State Conference of the NAACP, Disability Rights Florida, and Common Cause, challenging many of the provisions in SB 90 (2021), including new ID requirements for requesting mail-in ballots, new requirements for standing mail-in applications, limitations on the use of drop boxes, and others—this litigation is pending.

As noted earlier in this section, Republicans in the Texas state legislature are pushing a bill that would put limitations on early voting hours (including Sunday early voting), increase restrictions on vote-by-mail, and curb voting options such as drive-thru voting. This proposed law comes after an election cycle in which, despite the ongoing pandemic, the Governor limited the number of drop-off locations for mail-in ballots to one site per county via proclamation, forcing Harris County, for example, to cut their drop-off locations from 12 to 1. Republicans attempted to preemptively throw out more than 125,000 early voting ballots from drive-thru polling sites in Harris County (the state’s most populous county) via court challenge; and refused to expand eligibility for no-excuse absentee voting.

According to the Texas Tribune, Senate Bill (SB) 7 takes aim at opportunities to vote used by minority voters, “[p]ortions of the bill were specifically written to target voting initiatives Harris County used in the last election—such as a day of 24-hour early voting, drive-thru voting, and an effort to proactively distribute applications to vote

by mail—that were heavily used by voters of color. But under SB 7, those options will be banned across the state.” Ms. Longoria testified that SB 7 would have prohibited the Elections Administrator from opening the polls before 6:00 a.m. or after 9:00 p.m. on weekdays or Saturday—a prohibition that would “disproportionately hurt voters of color, particularly those who are Black and Hispanic.”

Despite failing to pass SB 7 in the regular legislative session, the Texas Legislature began a special session on July 8, 2021, in which both the House and Senate revived separate proposals (Senate Bill 1 and House Bill 3) that would enact restrictions on opportunities to vote such as outlawing the drive-thru voting option utilized by Harris County, regulating early voting hours to preempt expanded early voting opportunities such as 24-hour voting, and prohibiting local election officials from sending unsolicited mail-in ballot applications, among others.

Ms. Riggs testified that, once again, under the guise of “election integrity,” the North Carolina legislature is responding to the 2020 election by introducing bills that would restrict access to voting options. Ms. Riggs testified that one troubling bill moving through the legislature is Senate Bill (SB) 326, which would “[w]ith no justification” require voters to submit an absentee ballot request form earlier than was required in 2020, and would require all civilian absentee ballots to be received no later than 5:00 p.m. on Election Day to be counted—currently ballots postmarked by Election Day and received no later than three days after Election Day are counted. In analyzing data from the 2020 election, Ms. Riggs testified that, “SCSJ internal data show that in the first few days after Election Day in 2020, Black voters’ ballots represented a significant percentage of those ballots received when compared to White voters’ ballots (where race was designated)” and “[t]o be clear, all these voters who relied on the United States Postal Service would be disenfranchised under the new law. But the harm to Black voters, whose participation rate has dropped below the rate seen in 2008 and 2012, is very troubling.”

In March 2021, on the heels of record voter turnout in the November 2020 general election and January 2021 run-off election, the State of Georgia also enacted a suppressive voting law that makes cuts to voting opportunities, which will disproportionately impact minority voters.

Ms. Nelson of LDF testified that LDF, along with several partners, filed suit in the U.S. District Court for the Northern District of Georgia challenging Georgia’s SB 202 for intentional racial discrimination and discriminatory results under Section 2 of the VRA, intentional racial discrimination under the Fourteenth and Fifteenth Amendments, as an unconstitutional burden on the right to vote under the First and Fourteenth Amendments, and as an unconstitutional burden on the right to freedom of speech and expression under the First Amendment.

The Justice Department has also filed suit against the State of Georgia, the Georgia Secretary of State, and the Georgia State Elections Board over the newly enacted law, challenging provisions of the law under Section 2 of the VRA. The Justice Department’s complaint argues that several provisions of SB 202 were “adopted with the purpose of denying or abridging the right to vote on account of race.” The suit further alleges that “the cumulative and discriminatory effect of these laws—particularly on Black voters—was known to lawmakers and that lawmakers adopted the law despite this.”

CONCLUSION

Americans no longer vote solely on a single Tuesday. For millions of Americans,

Election Day-only voting is impractical or inaccessible. Increasing access to opportunities to vote benefits all voters and increases participation in our democratic process—but targeted restrictions on these opportunities disproportionately and discriminatorily burden minority voters. As Ms. Lang testified, “[t]he early in-person voting options are wildly uneven nationwide. While some Americans enjoy a broad range of voting opportunities, others face increasing constraints on their voting options.”

Cuts to early in-person voting, especially Sunday voting, and a lack of adequate early voting sites serves to disenfranchise minority voters and, in some cases, has been shown to be enacted with discriminatory intent. Additionally, mail-in voting is a safe, secure, and critical option for many voters, but if enacted with unreasonable and discriminatory barriers, can remain out of reach for many minority voters. Finally, attacks on alternative opportunities for returning a ballot have a discriminatory impact of many minority voters.

The evidence before the Subcommittee is clear—cuts to early voting, limiting the availability of early voting options, undue restrictions on mail-in ballots, and unfounded restrictions on ballot return options erect discriminatory barriers to voting.

CHAPTER EIGHT—CHANGES TO METHODS OF ELECTION, JURISDICTIONAL BOUNDARIES, AND REDISTRICTING

BACKGROUND

Discriminatory practices in, and changes to, methods of election, jurisdictional boundaries, and redistricting impact whether voters can elect representatives that reflect their voices and communities. Discriminatory redistricting, vote dilution, annexations, deannexations, drawing of jurisdictional boundaries, and changes to the method of election all affect elections and representation ranging from local-level school boards to state courts and Congressional seats.

Shelby County v. Holder itself began as a change to jurisdictional boundaries and the method of election for a local city council seat. There, the city attempted to change the district lines for the Calera City Council in Calera, Shelby County, Alabama. In redrawing the district lines, the voting population for Voting District 2 changed dramatically, bringing in hundreds of White voters, cutting the proportion of Black voters from more than two-thirds to one-third.

At the time, Alabama was subject to statewide preclearance under Section 5 of the VRA and the new district map was subject to review and approval by the Justice Department. The DOJ was not persuaded that the new map would not discriminate against Black voters and voided the new map. The day after the DOJ struck down the map, Calera held a previously scheduled city council election under the now-voided map in which Ernest Montgomery, the District 2 representative and the only African American on the five-member city council, was voted out of office. The DOJ blocked certification of the election results pending a new vote.

After a year of negotiation, Calera got rid of its district map, moving instead to a six-seat “at-large” council and in a new election, Ernest Montgomery won one of the seats. These circumstances served as the predicate for lawyers to bring suit challenging the constitutionality of the coverage formula and preclearance regime of the VRA.

The Voting Rights Act of 1965 prohibits not only discrimination in the denial of access to the ballot, but also in dilution of voters, such as the way district lines are drawn to dilute the ability of voters of color to elect

their preferred candidate. Voting changes that were once covered by Section 5 included, among others:

“(d) Any change in the boundaries of voting precincts or in the location of polling places. (e) Any change in the constituency of an official or the boundaries of a voting unit (e.g., through redistricting, annexation, deannexation, incorporation, dissolution, merger, reapportionment, changing to at-large elections from district elections, or changing to district elections from at-large elections). (f) Any change in the method of determining the outcome of an election (e.g., by requiring a majority vote for election or the use of a designated post or place system).”

Additionally, the redistricting process can and has been used to deny political power and equal representation to minority populations. As discussed below, without proactive protections against discriminatory redistricting, it can take years to litigate a redistricting case. While a case winds its way through the courts, numerous elections can take place under a map that is later found to be discriminatory and invalid.

States are entering the first federal decennial redistricting cycle without the full protections of the Voting Rights Act since its enactment in 1965. Without proactive protections to ensure district lines are not drawn in a discriminatory manner, voters could be forced to go to the polls under maps that years later, through lengthy and costly litigation, are found to be discriminatory and invalid.

The evidence presented to the Subcommittee demonstrates conclusively that changes to methods of election, alterations to jurisdictional boundaries, and redistricting can and do disproportionately and discriminatorily impact minority voters and can be, in some cases, wielded with discriminatory intent.

THE DISPROPORTIONATE AND DISCRIMINATORY BURDEN AND IMPACT ON MINORITY VOTERS OF CHANGES TO METHODS OF ELECTION, JURISDICTIONAL BOUNDARIES, AND REDISTRICTING

There is a long, documented history of methods of election, altering jurisdiction boundaries, and redistricting processes being used to discriminate against, dilute the voting power of, and effectively disenfranchise minority voters. Since Reconstruction and the rise of Jim Crow, as Black, Latino, Indigenous, and Asian American communities gained access to the franchise, overcame barriers to voting, and gained political power and voting strength, they have been met with suppressive tactics meant to dilute their votes and ensure voting power for the shrinking majority.

A November 2019 report on discriminatory voting practices produced by AAJC, MALDEF, and NALEO noted that, for example, since 1957, “there have been at least 1,753 legal and advocacy actions that successfully overturned a discriminatory change in method of election because of its discriminatory intent or effects.” The report also cites that at least 219 annexations or deannexations have been challenged and invalidated by a court or the DOJ, or amended or withdrawn. Additionally, according to the report, since 1957, 982 redistricting plans were challenged and invalidated by a court or the DOJ or amended or withdrawn because of their discriminatory intent or effects.

Professor Patty Ferguson-Bohnee testified that, before Shelby County, the Department of Justice issued nine Section 5 objections to redistricting plans involving Native voters in Alaska, Arizona, and South Dakota—five of those were in Arizona. Additionally, since 1966, 22 federal cases challenging at-large election systems, redistricting lines, or mal-

apportionment have been filed on behalf of Native voters, including state legislative districts, school boards, counties, sanitation districts, and city councils. Of these 22 cases, 6 were brought by the Department of Justice.

Thomas Saenz of MALDEF testified before the Subcommittee that Latino voters have also seen attempts to limit the growth of their voting power, including “the perpetuation or re-introduction of at-large voting or the failure to acknowledge and incorporate the growth of the Latino community in the decennial redistricting process.” Asian Americans have also seen the district drawing process used in attempts to dilute their voting power.

Black voters have long-experienced attacks on their voting power through vote dilution, annexations, redrawing jurisdictional boundaries, and discriminatory redistricting maps. As Justice Kagan noted in her *Brnovich* dissent, following the passage of the VRA:

“The crudest attempts to block voting access, like literacy tests and poll taxes, disappeared. Legislatures often replaced those vote denial schemes with new measures—mostly to do with districting—designed to dilute the impact of minority votes. But the Voting Rights Act, operating for decades at full strength, stopped many of those measures too.”

In the immediate aftermath of Shelby County, states and localities redistricted, drawing new lines, or changing the method of election from neighborhood seats to at-large districts, in ways “guaranteed to reduce minority representation.”

CHANGES TO METHOD OF ELECTION AND JURISDICTIONAL BOUNDARIES

Altering methods of election and jurisdictional boundaries has long been used to discriminate against minority voters and dilute voting power. In definitional terms, “method of election” refers to “the system for electing members of a body and may include features affecting the size and composition of the electorate that votes for a given seat, the timing of election for certain seats, and the number or percentage of votes required to win an election.”

At-large elections occur when representatives are elected from one large district simultaneously, rather than at the community level through local, single-member districts. Janai Nelson of the NAACP Legal Defense Fund testified that “[a]t-large elections can allow 51 percent of voters to control 100 percent of the seats on an elected body, which, in the presence of racially polarized voting and other structures, can dilute a racial minority group’s voice in the electoral system.” Multi-member elections occur when a jurisdiction is divided up into districts and, in each, voters all vote for each of the multiple seats. Shifts to these two methods can be used to dilute the voting power of minority communities and prevent them from electing representatives of their choosing.

In addition to altering the method of election, tactics such as annexations, deannexations, or shifting jurisdictional boundaries dilute the political power of minority voters by selectively altering the racial and ethnic makeup of the electorate.

In one of the first lawsuits challenging a change made after the VRA’s preclearance protections were undermined in Shelby involved a change to the method of election for the Pasadena, Texas City Council. MALDEF challenged the conversion of the Pasadena, Texas City Council from eight districted seats to six districted seats and two at-large seats. Mr. Saenz of MALDEF testified that this change was “plainly undertaken to prevent the growing Latino voting population

from electing a majority of the city council; participation differentials virtually ensured that the white population would elect its choices for the at-large seats in elections characterized by a racially polarized vote.”

Following a bench trial, the district court judge held that not only would the change have the effect of unlawfully diluting the Latino vote, but it was made intentionally to do so. Chief Judge Rosenthal of the U.S. District Court for the Southern District of Texas stated, “[t]he intent was to delay the day when Latinos would make up enough of Pasadena’s voters to have an equal opportunity to elect Latino-preferred candidates to a majority of City Council seats.” Mr. Saenz testified that, following a long and costly trial preparation and trial process, this resulted in the first contested “bail-in” order, requiring Pasadena to pre-clear future electoral changes.

Sonja Diaz of the UCLA Latino Policy and Politics Initiative noted that, in California, because of the 1990 federal court decision in *Garza v. Los Angeles County Board of Supervisors*, Los Angeles County was forced to create the first Latino-majority seat—30 years later, the Board of Supervisors still has only one Latino-majority district, despite the Latino citizen population increasing 77 percent over the last 20 years.

Mr. Saenz testified that, 10 years ago, MALDEF identified 8 counties in California that should have drawn an additional Latino-majority district on their 5-member county board of supervisors but failed to do so. Mr. Saenz testified that, “[e]ven with unlimited resources, challenging eight jurisdictions through litigation under section 2 of the VRA . . . would be daunting, if not impossible.” While MALDEF successfully challenged Kern County in “the first section 2 litigation to go to trial in California in well over a decade, seven other counties were able to leave their VRA-violative district maps in place throughout the decade.”

Examples of changes to methods of election, and related tactics can be found around the country. In 2014, a federal court ordered Yakima, Washington, to create new, single-member City Council districts to remedy an at-large districting scheme that routinely suffocated the vote of Latino voters. Ms. Diaz testified that, in the first election with the new districts, three Latinas were elected to the City Council, though this was met with forms of retaliation. In response, “the city clerk, along with some ousted white city council members, resigned an entire month early” and White council members “sought to leverage an at-large ballot referendum to reduce the electoral voice of Latinos by creating a strong mayor system.” Ms. Diaz testified that:

“In response, the non-Hispanic white members of the Yakima city council attempted a retaliatory change to the charter as a way to reduce the power of the city council to ensure that Latinos could not have a majority of the representation on the seven person council, in violation of Section 2 of the Voting Rights Act. [Voting Rights Project] successfully intervened on behalf of Latino plaintiffs to stop the proposed districting change to a mayor-council system, which if adopted, would revert the single-district council to an at-large election that dilutes the Latino vote.”

Ms. Nelson of the NAACP LDF testified that, in 2015, the County Commission in Fayette County, Georgia tried to revert to an at-large voting system in a special election to replace a Black Commissioner who had died unexpectedly. LDF won a Section 2 case that stopped this change and required the election to use single-member districts, which allow Black voters to again elect their preferred candidate.

In another example, in 2016, the largely white City of Gardendale, Alabama attempted to secede from the more diverse Jefferson County School Board, a move that would have effectively transferred Black voters in Gardendale from a system in which they had some ability to elect candidates of their choice, to the Gardendale city council's at-large election system in which Black voters have no ability to elect candidates of their choice. Ms. Nelson testified that, in 2018, the Eleventh Circuit Court blocked the secession after LDF successfully proved that Gardendale was motivated by racial discrimination. Since Shelby County, LDF has warned at least four local jurisdictions in Alabama that "the at-large aspects of their electoral systems may violate Section 2 of the VRA and potentially also the U.S. Constitution."

Ms. Nelson also testified that, in 2017, LDF "proved that the Louisiana Legislature intentionally maintained at-large elections for the state courts in Terrebonne Parish to prevent the election of a Black judge." A Black candidate has never been elected as a judge on the court in a contested election. A three-judge panel of the Fifth Circuit reversed the favorable decision in June 2020, despite the trial court's finding that plaintiffs clearly established vote dilution and denied LDF's petition for rehearing en banc.

Professor Patty Ferguson-Bohnee testified that at-large districts have also been used to deny Native American voters the opportunity to elect candidates of their choice—states such as Montana, North Dakota, South Dakota, and Wyoming have used this scheme over the last 25 years to deny voting power to Native voters.

In Utah, for example, the Justice Department sued San Juan County in the 1980s arguing that the at-large system violated Section 2 of the VRA—the resulting consent decree resulted in single-member districts. Despite population changes, the district lines did not change over the next 25 years and, despite changes that were made to the other two districts in 2011, the boundaries of the Native American-majority district remained the same. The Navajo Nation challenged the scheme of packing Navajo voters into one, single district out of three. As a result of multi-year litigation, the county's districts were reconfigured, and Native Americans were able to elect two candidates of choice—litigation that took seven years and cost plaintiffs \$3.4 million.

There are additional examples of the Justice Department filing suit under Section 2 challenging methods of election schemes in the years post-Shelby. In 2017, the Justice Department filed a complaint under Section 2 challenging the City of Eastpoint, Michigan's, at-large method of electing the city council as diluting the voting strength of Black citizens; and in June 2019, the court entered the parties' consent decree providing for the city to use ranked choice voting to resolve the claims. On May 27, 2020, the Department filed a complaint challenging the at-large method of election for the school board of the Chamberlain School District under Section 2 of the VRA in South Dakota alleging that the Native American population of the School District is sufficiently large and geographically compact to constitute a majority of the voting-age population and that the at-large method of election the Chamberlain School Board dilutes the voting strength of American Indian citizens.

As recently as April 14, 2021, the DOJ filed a complaint and proposed consent decree under Section 2 of the VRA, challenging the at-large method of electing the board of alderman of the City of West Monroe, Louisiana's, city council, arguing that the current

method of electing the West Monroe Board of Aldermen dilutes the voting strength of Black citizens, who constitute 28.9 percent of the voting-age population of the City of West Monroe, but no Black candidate has ever been elected to the West Monroe Board of Aldermen, and no Black individual has ever been appointed to the Board.

This is merely a sampling of discriminatory actions executed through changes to methods of election and changes to jurisdictional boundaries. The evidence before the Subcommittee clearly illustrates that these practices are enacted with discriminatory effect and intent, resulting in the dilution of the voting power of minority voters and a severe restriction of their ability to elect candidates of their choosing.

Redistricting

Each decade, following the decennial census and distribution of population data, states undertake to redraw or update district lines—this affects districts up and down the ballot and at all levels of government. Discriminatory redistricting practices have been utilized for decades to dilute and suppress the voting power of minority voters and can impact representation at all levels of government. To put a finer point on it—in 1991, since-deceased Republican consultant Thomas Hofeller said, "I define redistricting as the only legalized form of vote-stealing left in the United States today."

In redistricting, officials can also use tactics known as "cracking" and "packing" to dilute the votes of minority communities. "Cracking" occurs when officials divide voters into a number of different districts, such that the minority voters in the districts do not have a majority in any of them—the purpose of which is to maximize the number of wasted votes. "Packing" occurs when voters are placed into one or only a few districts, so the remaining districts are easier for non-minority voters to control.

The country is now about to begin the first redistricting cycle without the full protections of the Voting Rights Act in more than a half century. According to the USCCR's 2018 report on minority voting rights access, "overall data shows that there have been over 3,000 changes submitted due to redistricting in every 10-year cycle since the 1965 VRA was enacted." Research performed by AAJC, MALDEF, and NALFO found that, since 1982, "at least 389 redistricting plans have been challenged by a court of the DOJ, or amended or withdrawn by responsible lawmakers, because of their discriminatory intent or effects."

The redistricting process can and has been used to deny political power and equal representation to minority populations. While a district is supposed to follow the "one person, one vote" doctrine established by the Supreme Court in the 1960s, the drawing of districts is all too often done behind closed doors, without meaningful public input, and in a manner used to dilute the voices of some voters and, in effect, give disproportionate voting power to others.

Former Attorney General Eric H. Holder, Jr., Chairman of the National Democratic Redistricting Committee, testified before the Subcommittee that:

"In the days since that ruling eight years ago, unnecessary and discriminatory voting restrictions went up across the country . . . And we saw newly emboldened state legislatures draw discriminatory maps that unfairly placed Black people and other people of color, young and poor people, into gerrymandered voting districts where their impact would be diluted and their voice ultimately lost."

Jerry Vattamala of AALDEF testified that "Asian Americans have been historically

disenfranchised in the redrawing of district boundaries and in their right to vote." Mr. Vattamala further testified that the percentage of Asian American elected officials is not keeping track with the population growth, in many instances because Asian American communities of interest are divided into numerous districts, "subverting the growth and thwarting the effects of this growth and the numbers, to deny them the ability to elect a candidate of their choice." Mr. Vattamala stated further that "we only see Asian American electoral representation when we have fair redistricting. Only then are they able to elect a candidate of choice and they usually do."

Professor Ferguson-Bohnee testified that "[i]n addition to well-documented access barriers, redistricting has been used as a tool to suppress Native American voting rights and depress Native American political power." In Arizona, for example, "Tribal voters challenged redistricting plans every cycle since the 1960s, except for the last decade following the 2010 Census." The last decade was the first time Arizona's maps were precleared on the first attempt—now, the retrogression standard required under Section 5 of the VRA is no longer an option to protect the state's single Native American majority-minority district in the upcoming redistricting cycle.

Litigation alone can take years to remedy the harm of gerrymandering, meaning voters spend years represented by maps that are later found to have violated their rights. Cases challenging discriminatory maps drawn in the 2010 redistricting cycle in North Carolina and Texas, for example, took more than half a decade to litigate, all while voters went to the polls under districting maps later found to be discriminatory and unlawful.

Allison Riggs of the Southern Coalition for Social Justice testified that, "[i]n the last decade, the North Carolina legislature's repeated violations of the Fourteenth Amendment in redistricting, local and statewide, should give anyone pause, and are strong evidence of the need for federal protections."

Specifically, in North Carolina, the state drew redistricting maps that packed Black voters into as few districts as possible. Plaintiffs filed a lawsuit, and the federal courts found that the challenged districts violated the Equal Protection Clause. However, as Ms. Riggs testified, when the State General Assembly was given the first chance to remedy the districts, the legislature perpetuated the racial packing. In 2016, after the District Court ruled against the state's maps, state legislators drew new maps, this time admitting the purpose of the maps was partisan.

In 2017, the Supreme Court upheld the lower court's rejection of two North Carolina congressional maps on the grounds that North Carolina's Republican-controlled legislature relied too heavily on race in drawing the maps. The state's maps had been the subject of continuous litigation since the 2011 redistricting—all the while, voters went to the polls to cast ballots under maps that were found, years later, to be unlawfully discriminatory. On October 28, 2019, a North Carolina state court again ruled against the state's congressional district maps, saying the record of partisan intent was so extensive that opponents of the maps were poised to show that the maps were unconstitutionally gerrymandered to favor Republicans over Democrats and the voters would be irreparably harmed if the 2020 elections were held using those maps.

But the North Carolina legislature is not the only bad actor. In 2019, Sean Young of the ACLU of Georgia testified before the Subcommittee that the ACLU's case in Sumter County, Georgia "perfectly illustrates

the damage that Shelby County has caused.” In 2011, 67 percent of Sumter County’s Board of Education was African American (six out of nine)—then the General Assembly proposed a redistricting plan that would reduce the percentage of African Americans on the Board to 28 percent (two of seven) and submitted the plan to the DOJ for preclearance. The DOJ did not preclear the plan, but following the Shelby decision the Board was able to immediately implement its discriminatory plan. Soon thereafter, the ACLU of Georgia brought a lawsuit to overturn a discriminatory gerrymandering plan in Sumter County, Georgia—a federal court eventually ruled that the plan was discriminatory and violated the Voting Rights Act, five years after the plan went into effect and after years of expensive, time consuming litigation. In the intervening five years, School Board elections were held under a plan that was discriminatory and illegal.

In September 2013, the U.S. Department of Justice filed a complaint against the State of Texas as a plaintiff-intervenor in *Perez v. Perry* (W.D. Tex.), seeking a declaration that Texas’ 2011 statewide redistricting plans to the State House of Representatives and the Congressional delegation were adopted “with the purpose of denying or abridging the right to vote on account of race, color, or membership in a language minority group in violation of Section 2 of the Voting Rights Act” and contended that the Texas state legislature’s plan diluted the voting power of Asian Americans and other people of color.

Jerry Vattamala, Director of the Democracy Program at AALDEF, testified before the Subcommittee that, at the time of *Perez v. Perry*, Texas State House District 149 had a combined minority citizen voting-age population of close to 62 percent, and since 2004, the Asian American community in the District had voted as a bloc with Hispanic and African American voters to elect Hubert Vo, a Vietnamese American and the first Vietnamese American state representative in Texas history, as their representative.

In 2011, the state legislature sought to eliminate Vo’s seat and redistribute the coalition of minority voters to the surrounding districts. In denying preclearance of the plan in 2012, the three-judge panel in Washington, D.C., found that the congressional and state redistricting plan had “both a retrogressive effect and a racially discriminatory purpose. The decision later had to be vacated and remanded in light of the Supreme Court’s decision in *Shelby* and its implications for Section 5 preclearance claims. That was not the end of litigation over Texas’ redistricting plans, however. The legal battle over Texas’ 2011 maps would go on for more than three-quarters of the decade and cost millions of dollars. In the intervening years interim maps were put in place. Eventually, in *Abbott v. Perez*, the Supreme Court would allow all but one of Texas’ political districts to remain in place through the end of the decade. The Court upheld the maps despite a district court describing the process used to create them as “discriminatory at its heart”—while the Court did not specifically find discriminatory purpose in the adoption of the 2013 maps, “it did not dispute the determination that the 2011 maps were infected with the discriminatory intent to limit the influence of voters of color.”

The State of Texas has a long history of racial discrimination in redistricting plans. In discussing Texas’ long history of discrimination in voting, in *Veasy v. Abbott*—litigation over Texas’ strict voter ID law—a federal court found in 2017 that “[i]n every redistricting cycle since 1970, Texas has been found to have violated the Voting Rights Act with racially gerrymandered districts.” Despite being covered by the VRA since 1965,

federal judges have ruled at least once every decade since then that Texas violated federal protections for voters in redistricting.

In testimony before the Subcommittee, Thomas Saenz of MALDEF testified that:

“Last decade, the state of Texas gained four congressional seats as a result of its comparatively rapid growth over the course of the aughts. Nearly two-thirds of that Texas population growth came in the Latino community. Still, in adopting a new congressional district map, the Texas legislature drew none of the four new districts within the Latino community, instead engaging in splitting the increased concentrations of Latino population among multiple districts in order to prevent Latino voters from electing candidates of choice. It took nearly a full decade of litigation under the VRA, waged by MALDEF and others, to ensure that an interim map, more respectful of the growing Latino community, would remain in place to protect Latino voters.”

In testimony submitted to the Subcommittee, Professor Ferguson-Bohnee detailed the long history of minimizing Native American political representation through redistricting in the State of Arizona. The 2010 redistricting cycle was the first time Arizona’s maps were precleared on the first submission. Tribes have previously participated in redistricting and defended the single majority-minority Native American legislative district—Arizona, like other states, is no longer subject to Section 5 preclearance for the coming redistricting cycle.

In North Dakota, tribal leaders raised concerns before the Subcommittee at the 2019 field hearing that, though there is only one at-large Congressional representative, their reservations are divided in a way at state-level redistricting that no Native American can win a seat representing the tribal lands. State Representative Ruth Buffalo testified in 2019 that, while she was the only Native American serving in the State House at the time of the hearing, she represents District 27—Fargo, North Dakota—a district 370 miles from her homelands of the Fort Berthold Reservation, and that the district representing Fort Berthold encompassed a white population that overwhelms the Native American population.

In another example, Professor Ferguson-Bohnee testified that, in South Dakota, “discrimination in redistricting led to prolonged litigation followed by consent decrees.” In 2004, in *Kirkie v. Buffalo County*, Buffalo County gerrymandered its three districts by packing 75 percent of the Indian population into one district. As Professor Ferguson-Bohnee testified:

“The county, the “poorest in the country,” was comprised of approximately 2,100 people, of which 83 percent were Indian. This redistricting had the purpose of diluting the Indian vote, as whites controlled both of the other two districts and thus County government. The case was settled by a consent decree wherein the county admitted its plan was discriminatory and was forced to redraw the district lines. In addition, the county agreed to subject itself to Section 3(c) of the Voting Rights Act, which requires the submission of voting changes for preclearance.”

Professor Ferguson-Bohnee testified that, in 2005, another South Dakota County was forced to redraw district lines “for similar malapportionment of Indian voters.” Professor Ferguson-Bohnee testified that “[p]reclearance may have prevented this type of de facto discrimination, because the changes would have needed preclearance approval prior to enactment.”

Dividing tribal communities and ignoring tribal boundaries in the redistricting process also dilutes the Native American vote. Professor Ferguson-Bohnee testified that, while

dividing reservation boundaries may be required to meet equal population requirements and to enhance voter effectiveness, there “are several examples of redistricting schemes that divide tribal communities to reduce voting strength.” Professor Ferguson-Bohnee notes that, for example, in recent years redistricting bodies have divided tribal communities into multiple districts in Wisconsin, Washington, Montana, and California—in Washington, the maps split three separate reservations.

Mr. Vattamala testified that, in the past, redistricting plans have also diluted Asian American voting strength by fragmenting communities into multiple districts. Mr. Vattamala highlighted that Section 5 coverage was not only in the South—New York previously had three covered counties as well, which helped protect minority communities. In New York City, for example, Mr. Vattamala testified that congressional district boundaries have divided Asian American communities. In the case *Favors v. Cuomo*, AALDEF submitted materials superimposing the existing State Assembly and Senate, and Congressional district lines over the Asian American communities of interest, illustrating how divided each of the communities were among multiple districts, essentially denying the community the ability to elect candidates of their choice.

Mr. Vattamala testified that:

“AALDEF was ultimately able to convince the Special Master to draw a fair congressional district in Queens that kept Asian American [Communities of Interest] whole, and together. Several months later that district elected the first Asian American to Congress from New York State, and it was primarily because the community was finally allowed the opportunity to elect a candidate of its choice. This result was likely only possible through federal litigation.”

Mr. Vattamala testified that the Asian American community, working together with the Black community and the Latino community, formed what they call a unity map that “protected all the communities of color that were protected under the Voting Rights Act,” and that it was very powerful to have the knowledge that Section 5 existed, that the map drawers started from a position of ensuring they were complying with Section 5 and “not retrogressing districts.” Those protections are no longer in place.

Partisan gerrymandering is also a form of vote denial and dilution that can disproportionately impact minority voting power when minority voters heavily favor one party over another. In 2019, however, the Supreme Court in *Rucho v. Common Cause* declined to weigh in on the question of when partisan gerrymandering has crossed constitutional bounds, holding that partisan gerrymandering claims are nonjusticiable, presenting political questions beyond the reach of the federal court. This decision leaves voters vulnerable to 50 different interpretations of what constitutes an impermissible partisan gerrymander in the upcoming redistricting cycle. In their opinion, the Court did, however, leave space for Congress to formulate a test for determining when a map constitutes a partisan gerrymander.

CONCLUSION

The evidence before the Subcommittee is clear, changes to method of election, redrawing jurisdictional boundaries, and the redistricting process have all been used time and again to dilute the voting power of minority voters, denying them the opportunity to elect candidates of their choice and a real voice in democratic governance. Redistricting cases “typically require massive amounts of attorney time and millions of

dollars in expert fees,” leaving many communities vulnerable to discrimination and suppression when voting rights litigators cannot intervene on their behalf and without the proactive protections of a federal preclearance regime. As former Attorney General Holder testified, “[w]e need to end gerrymandering, so that all people, including people of color, can be represented by public servants of their choice and be able to hold those representatives politically accountable.”

Conclusion

The Voting in America hearings conducted by the Subcommittee show conclusively that discrimination in voting does, in fact, still exist. The evidence gathered by the Subcommittee not only illustrates that discrimination exists, but that it has grown steadily in the wake of the Supreme Court’s decision in *Shelby County*. Furthermore, the evidence demonstrates that the “extraordinary measures” once deployed by the Voting Rights Act remain necessary today, and that the removal of those safeguards released a torrent of voter suppression laws the VRA once succeeded in holding back.

As former Attorney General Eric Holder testified:

“Before 2013, Section 5 had helped prevent discriminatory voting laws from taking effect by imposing preclearance protections that required a federal review of changes to voting procedures in covered regions. Basically, areas with a history of discrimination had to get approval from the Department of Justice or from a federal court for significant changes in voting laws or procedures. That section of the Voting Rights Act had helped to stop some of the worst attempts to discriminate against minority voters for decades. But in a five-to-four opinion, the conservative members of the Court wrote that the nation had “changed dramatically” since the Voting Rights Act went into effect and that, because of gains made, particularly by Black Americans, these protections were no longer necessary.”

The evidence demonstrates that the nation has not changed as dramatically as the Court’s majority may have thought. In the eight years since *Shelby County* was decided, states have taken significant steps toward suppressing the vote. Across the country, states have purged millions of voters from the voting rolls; enacted a rash of strict voter ID laws; attempted to implement documentary proof of citizenship laws; failed to provide necessary language access and assistance to limited-English proficiency voters; closed, consolidated, or relocated hundreds if not thousands of polling locations, causing voters to wait in long, burdensome lines to vote; attempted to cut back on opportunities to vote outside of Election Day; and employed changes to methods of elections, jurisdictional boundaries, and redistricting as methods to dilute and disenfranchise minority voters.

Litigation under Section 2 of the Voting Rights Act and the Constitution has proven to be a powerful but inadequate tool to combat the wave of voter suppression tactics unleashed in the years since *Shelby*. Janai Nelson, Associate Director-Counsel for the NAACP Legal Defense Fund, testified that, in the first five years following *Shelby* “an unprecedented 61 lawsuits were filed under Section 2 of the Voting Rights Act,” of which “[t]wenty-three cases were successful.” By contrast, “in the five years before *Shelby*, only five Section 2 cases were won.” Litigation alone is not an adequate remedy to protect the right to vote—cases arising under Section 2 of the Voting Rights Act are reactive, costly, and can take years to litigate.

The 2018 and 2020 elections saw record voter turnout. While this is indeed an outcome to be celebrated, it is not, as some argue, an indication that voter suppression and discrimination no longer exists. The evidence gathered by the Subcommittee demonstrates that voters turned out in record numbers despite suppressive voting laws and a once-in-a-century pandemic. And yet, the reaction of Republican-led legislatures around the country to historic voter turnout has been to unleash a new wave of restrictive voting laws in the months following the 2020 election. States with a history of discriminatory voting practices and racially polarized voting continue to enact voting laws without analyzing whether these provisions discriminate against minority voters.

The false specter of fraud has been cited to support these new restrictive provisions. But, as we have heard time and again, numerous investigations have found no credible evidence of fraud in the 2020 election. Indeed, according to cyber and elections security experts, “the November 3rd [2020] election was the most secure in American history.” Unfortunately, fueled by the “Big Lie” that the election was stolen, insurrectionists attempted to stop the certification of a lawful, valid, democratic presidential election by storming the Capitol on January 6, 2021. In the six months since the attack, efforts to suppress the vote and subvert democracy have continued, as state legislatures have moved quickly to meet the increase in voter turnout with voter suppression.

According to the Brennan Center for Justice, as of May 14, 2021, more than 389 bills in 48 states have been introduced restricting the vote. As of June 21, 2021, 17 states have enacted 28 new laws that restrict access to the vote, with some state legislatures still in session. At least 16 restrictions on mail voting will make it more difficult for voters to cast mail ballots that count in 12 states. At least eight states have enacted 11 laws making in-person voting more difficult. And more bills are still moving through state legislatures.

These new laws only compound the legal and administrative hurdles enacted in the eight years since *Shelby*. As former Attorney General Holder testified:

“These actions have not made our elections safer or more secure. They have not improved the quality or accessibility of our politics. Instead, they have stripped Americans of fundamental rights and undermined the promise of American democracy. And they have all—every one of them—disproportionately impacted people of color.”

For example, Michael Waldman, President of the Brennan Center for Justice, testified that “[i]n 2013, at least six states—Alabama, Mississippi, North Carolina, North Dakota, Virginia, and Texas—implemented or began to enforce strict photo ID laws, most of which had previously been blocked by the Department of Justice due to their discriminatory impact.” Federal courts in at least four states have found strict voter ID laws to be racially discriminatory, including Texas and North Carolina’s laws. In previously covered jurisdictions, 1,688 polling places were closed between 2012 and 2018, all with none of the disparate impact analysis previously required by preclearance. Restrictions targeting early voting opportunities can and do have a direct impact on minority voters.

Thomas Saenz, President and General Counsel for MALDEF, testified that, “[t]here is simply no way that non-profit voting rights litigators, even supplemented by the work of a reinvigorated Department of Justice Civil Rights Division, could possibly prevent the implementation of all of the undue ballot-access restriction and redistricting violations that are likely to arise in the next two years.”

The evidence compiled by the Subcommittee illustrates that the voting and election administration practices of purging voters from the voting rolls; enacting voter ID and proof of citizenship requirements; failing to provide necessary multi-lingual voting materials and assistance; closing, consolidating, or relocating polling places; cutting or restricting access to alternative opportunities to vote; and altering methods of election, jurisdictional boundaries, and redistricting disproportionately impacts Black, Latino, Native American, Asian American, and other minority voters and impedes access to the ballot in a discriminatory manner.

Congress needs to listen to the American people. The Voting Rights Act was not written in the halls of Congress—it was written between *Shelby* and *Montgomery*. It was written by Americans who fought for equal access to what was promised to be a democracy. We are again hearing from the people on the need to protect the right to vote.

Defending democracy used to be a bipartisan endeavor. Since the Voting Rights Act first passed in 1965, Congress has acted several times, and in a bipartisan manner, to protect access to the vote. The Voting Rights Act was reauthorized five times with bipartisan votes—and signed into law each time by a Republican President. The 2006 VRA reauthorization was introduced by a Republican congressman. Moreover, Congress has passed additional voting bills, including the Uniformed and Overseas Citizen Absentee Voting Act (UOCAVA) in 1986, the National Voter Registration Act (NVRA) in 1993, and the Help America Vote Act (HAVA) in 2002 with bipartisan support. Bipartisan commissions such as the Carter-Baker Commission and the Presidential Commission on Election Administration endeavored to create best practices in elections to improve the voting experience.

We are now at an inflection point in protecting our democracy. The time has come for Congress to utilize its constitutional authority to protect the fundamental right to vote for all Americans. As Mr. Henderson stated before the Subcommittee, “[f]or democracy to work for all of us, it must include all of us.” “It is unacceptable that in 2021, 56 years after the VRA’s passage,” Ms. Nelson stated, that “the right to vote remains so very under-protected. This model is not sustainable nor is it acceptable.”

And as Chief Justice Earl Warren wrote in 1964, the year before the passage of the Voting Rights Act, the “right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of the representative government.” After reviewing thousands of pages of evidence collected during this Congress and listening to the testimony of dozens of experts from across the country, as summarized in this report, the evidence demonstrates one clear command: Congressional action is needed.

ENROLLED BILL SIGNED

Gloria J. Lett, Deputy Clerk of the House, reported and found truly enrolled a bill of the House of the following title, which was thereupon signed by the Speaker:

H.R. 3642. An Act to award a Congressional gold medal to the 369th Infantry Regiment, commonly known as the “Harlem Hellfighters”, in recognition of their bravery and outstanding service during World War I.